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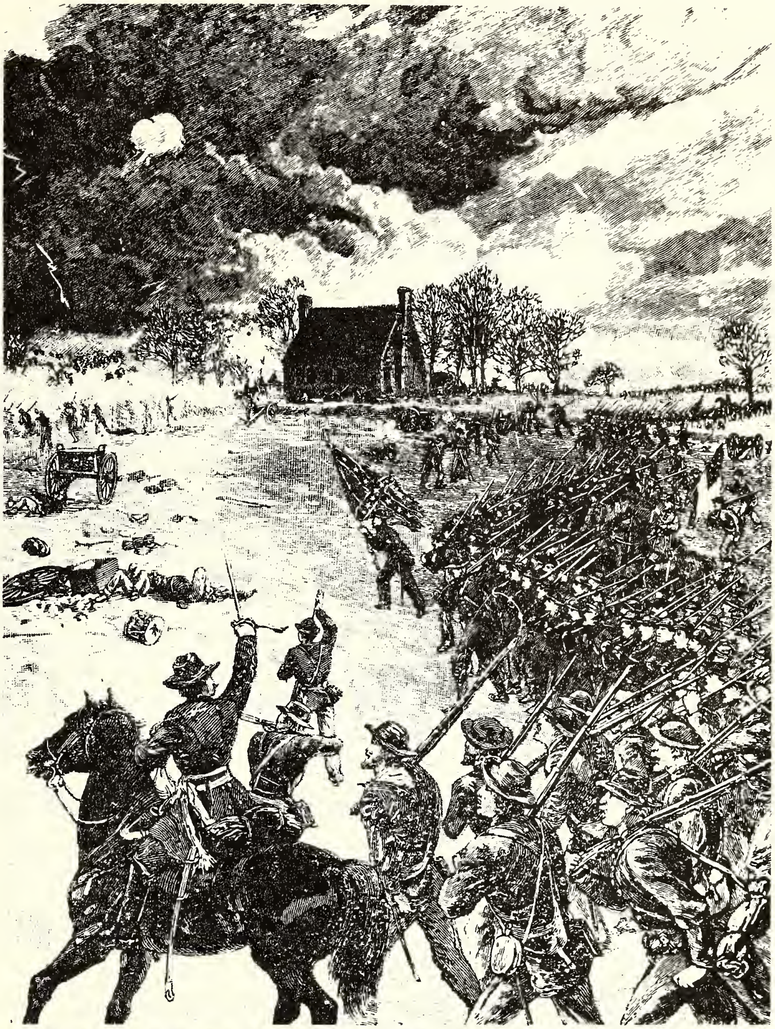

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VENUE OF TRANSITORY ACTIONS AGAINST RESIDENT INDIVIDUAL CITIZENS IN MISSISSIPPI — STATUTORY REVISION COULD REMOVE NEEDLESS COMPLEXITY

*Guthrie T. Abbott**

I. Introduction

The rules for fixing venue in Mississippi civil actions evolved from a statutory foundation modeled upon the English common law, followed by a century and a half of legislative tinkering and judicial interpretation of the legislative activity. The Mississippi approach to venue mirrors what has happened in most jurisdictions throughout the United States, but critical analysis is uniform in suggesting that Mississippi and most states have been marching together in the wrong direction.[1] Confusion as to the appropriate county in which to commence a civil action stems from legislative imprecision in defining terms and a hazy judicial gloss added by the courts.

Early English common law established the venue dichotomy of local, as opposed to transitory, causes of action. Local actions, which traditionally have concerned real estate, must be brought in the county where the land or some part of it lies.[2] Early common law suits in England were required to be tried in the county where the cause of action arose, because the jury selection process was designed to obtain jurors with personal knowledge of the dispute.[3] As the role of the jury changed in England, the courts at an early time permitted the use of fictitious allegations to place venue for transitory actions anywhere in England.[4] A study conducted in the United States in the 1950's reveals that the vast majority of the American states departed from the English practice.[5] The data from this study indicates that most state codes provided for a fixed place of trial in local actions and then selected from the following different fact situations to formulate statutory rules of venue for transitory causes of action:[6]

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[1] *See* Stevens, *Venue Statutes: Diagnosis and Proposed Cure*, 49 Mich. L. Rev. 307, 316-31 (1951)(inconsistency among state venue schemes). Local action venue provisions, which usually involve real property, have led to confusion in distinguishing between venue and jurisdiction. *Id.* at 310. *See generally* Note, *A Question of Venue*, 43 Miss. L.J. 130, 130 (1972).

[2] F. James & G. Hazard, Civil Procedure § 12.3 (2d ed. 1977). Modern venue rules provide that actions involving possession of land, partition, foreclosure, or a suit to quiet title must be brought in the county where the res is located. *Id.*

(a) where the cause of action, or part thereof, arose or accrued;
(b) where some fact is present or happened;
(c) where the defendant resides;
(d) where the defendant is doing business;
(e) where the defendant has an office or place of business, or an agent, or representative, or where an agent or officer of defendant resides;

For a case illustrative of the problems which historically have occurred with the common law notion of local action, see Livingston v. Jefferson, 15 F. Cas. 660, 663 (D. Va. 1811)(No. 8,411)(plaintiff left with no remedy because of adherence to common law precedent). *But see* Reasor-Hill Corp. v. Harrison, 220 Ark. 521, 249 S.W.2d 994, 996 (basic principles of justice demand that wrongs should not go unredressed).

[3] T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 127 (5th ed. 1956). The intent behind the formation of a jury, especially in the early days of common law, was to make it representative of the community. *Id.*; *see* J. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 65 (1979)(jurors encouraged to inform themselves before trial); BLACKSTONE'S COMMENTARIES ON THE LAW 675 (B. Gavit ed. 1941)(trial held in county where cause of action arose and where jurors lived); G. CRABB, HISTORY OF ENGLISH LAW 298 (1987)(law required that jury should be acquainted personally with issues of case).

[4] Fortune, *Venue of Civil Actions in Kentucky*, 60 KY. L.J. 497, 521 (1972). Courts allowed denials of these fictitious allegations in land disputes, and venue became proper in the county where the land was located. *Id.*; *see* 56 AM. JUR. *Venue* § 2 (1947)(courts invented fiction and allowed parties to allege that cause of action occurred in any county).

[5] Stevens, *supra* note 1, at 310-15 (1951). In the United States, positive legislation largely replaced the broad English common law approach to venue in the majority of the states. *Id.* at 315. Transitory venue provisions have varied throughout the United States to such a degree that an attorney preparing to file suit in another state should make it a point to familiarize himself with the venue provision of the foreign state. *Id.* at 309. However, venue statutes for local actions have remained fairly uniform. *Id.*

[6] *Id.*

(f) where the plaintiff resides;
(g) where the plaintiff is doing business;
(h) where the defendant may be found;
(i) where the defendant may be summoned or served;
(j) in the county designated in the plaintiff's complaint;
(k) in any county;
(l) where the seat of government is located.[7]

Problems in interpreting venue statutes have occurred throughout the United States in general[8] and in Mississippi in particular, especially with regard to judicial and legislative attempts to define and apply the terms "venue" and "jurisdiction."[9] The most vivid example of such vernacular confusion in Mississippi is the statute which uses the term "venue jurisdiction."[10]

The purpose of this article is to analyze the present state of Mississippi law regarding venue of transitory causes of action in the circuit, chancery, and county courts of Mississippi, with emphasis upon some major statutory and judicial developments which have occurred during the past several years. The major issues explored will be: (1) the uncertainty resulting from the 1984 amendment to the circuit court venue statute, with regard to both the resident individual citizen's right to be sued in the county of his household and residence and the lack of uniformity between venue provisions for circuit and chancery courts; (2) whether Mississippi has adopted by judicial decision the concept of intrastate forum non conveniens; (3) whether a resident citizen sued in an improper venue waives his venue objection by failing to appear and suffering default judgment. The article will conclude with recommendations for statutory change, with an aim toward bringing more certainty to an area which has lacked clarity for as long as Mississippi has been a state.

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[7] *Id.* at 310-15.

[8] *Id.* at 316-23. Statutory language of virtually all states contains basic problems with the definition of venue. *Id.* at 318. Few states have had precise or adequate procedures for raising objections to improperly laid venue. *Id.* at 321-23. Furthermore, the principles of jurisdiction and venue have commingled in such a manner that procedural attack has often served only to further injustice. *Id.* at 310-20.

[9] Comment, *Territorial Jurisdiction*, 29 Miss. L.J. 320, 320 (1958).

[10] Miss. Code Ann. § 11-11-17 (Supp. 1988) states in part:

> (1) Where an action is brought in any circuit, chancery or county court of this state, of which the court in which it is brought has jurisdiction of the subject matter, but lacks *venue jurisdiction*, such action shall not be dismissed because of such lack of proper venue, but on objection on the part of the defendant shall, by the court, be transferred to the venue to which it belongs.

Id. (emphasis added).

II. WHERE THE CAUSE OF ACTION OCCURS OR ACCRUES AND WHERE THE DEFENDANT MAY BE FOUND

Until the 1984 amendment to the circuit court venue statute, venue for resident citizens in circuit court actions remained essentially as carried forward from the Mississippi Circuit Court Act of 1822[11] to Hutchinson's Code of 1848.[12] According to the 1848 statute, proper venue for local actions was the county in which the cause of action arose,[13] and in all other actions, the county in which the defendant might be found.[14] The transfer provision provided that if the defendant was sued outside his county of residence, then the action could be transferred to his home county, unless the action was local in nature.[15]

Placing venue in the county where "the defendant may be found" follows the common law tradition that links the right of action with the person, and a substantial number of states have employed this type of venue provision.[16] Providing for trial in the county where the defendant resides, as was effected in Mississippi by the resident's absolute right to transfer venue to his county of residence and freehold, has been a common venue provision throughout the United States.[17] Until its amendment in 1984, the circuit court venue statute retained the essential provisions, which date back to 1822, regarding suit in the county where a resident may be found, with the absolute right to transfer back to his county of household and residence if the resident was "found" elsewhere.[18]

---

[11] 1822 Miss. Laws 50.

[12] HUTCHINSON'S CODE OF 1848, ch. 58, art. 1 (19) provided:

> All civil actions and causes which may be instituted in any of the courts aforesaid, *shall be commenced in the Circuit Court of the county in which the defendant may be found*, or if it be a real action, action of ejectment, or trespass *quare clausum fregit*, then in the county in which the cause of action arose; and all actions so commenced, may be brought to issue, according to the rules that may be established for the orderly conducting and arrangement of business in the said courts; . . . *Provided always, That if a freeholder of this state, is sued out of the county of his freehold and residence, unless in the actions enumerated in this section, the venue shall be changed, by order of the court, to the county of his residence and freehold*: and no freeholder of the state shall be held to bail, out of the county of his freehold and residence.

Id. (emphasis added).

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] Stevens, *supra* note 1, at 313-14. Mississippi is included among the states whose statute provides that proper venue includes the county where "the defendant . . . may be found . . . ." MISS. CODE ANN. § 11-11-3 (Supp. 1988); *see infra* text accompanying note 19. It is possible that the original intent behind such language was to aid in the

As amended in 1984, section 11-11-3 of the Mississippi Code provides:

> Civil actions of which the circuit court has original jurisdiction shall be commenced in the county in which the defendant or

---

service of process, not to establish a basis for venue. Stevens, *supra* note 1, at 314.

[17] Stevens, *supra* note 1, at 311. The resident defendant venue provision carries with it the potential for abuse by joining defendants for the sole purpose of fixing venue. *Id.* at 329. *But see* Jefferson v. Magee, 205 So. 2d 281, 283 (Miss. 1967)(right of citizen to be sued in resident county is valuable); Crosby v. Robertson, 243 Miss. 420, 426, 137 So. 2d 916, 918 (1962)(same); Indianola Cotton Oil Co. v. Crowley, 121 Miss. 262, 265, 83 So. 409, 409-10 (1920)(where there are two defendants, suit may be brought in county of residence of either); Long v. Patterson, 198 Miss. 554, 562, 22 So. 2d 490, 492 (1945)(right of citizen to be sued in resident county is valuable).

[18] Immediately prior to the 1984 amendment, MISS. CODE ANN. § 11-11-3 (1972) read as follows:

> Civil actions of which the circuit court has original jurisdiction *shall be commenced in the county in which the defendant or any of them may be found*, and if the defendant is a domestic corporation, in the county in which said corporation is domiciled, or in the county where the cause of action may occur or accrue except where otherwise provided, and except actions of trespass on land, ejectment, and actions for the statutory penalty for cutting and boxing trees and firing woods and actions for the actual value of trees cut which shall be brought in the county where the land or some part thereof, is situated; but if the land be in two or more counties, and the defendant resides in either of them, the action shall be brought in the county of his residence, and in such cases, process may be issued against the defendant to any other county. *If a citizen resident in this state shall be sued in any action, not local, out of the county of his household and residence*, or if a public officer be sued in any such action, out of the county of his household and residence, although a surety or sureties, or some of the sureties, on his bond, or other joint defendant, sued with him, be found or be subject to action in such county, *the venue shall be changed, on his application, before the jury is impaneled, to the county of his household and residence*, whether such suit is filed before or after such officer's term of office has expired.

MISS. CODE ANN. § 11-11-3 (1972) (amended 1984)(emphasis added).

> any of them may be found or in the county where the cause of action may occur or accrue and, if the defendant is a domestic corporation, in the county in which said corporation is domiciled or in the county where the cause of action may occur or accrue, except where otherwise provided, and except actions of trespass on land, ejectment and actions for the statutory penalty for cutting and boxing trees and firing woods and actions for the actual value of trees cut which shall be brought in the county where the land or some part thereof is situated. If a civil action is brought in an improper county, such action may be transferred to the proper county pursuant to section 11-11-17.[19]

Comparing the current statute to its predecessor reveals two major changes regarding venue of suits against resident individual defendants. First, venue is now proper in the county where the cause of action occurred or accrued, as well as in the county in which the resident individual defendant may be found.[20] Second, the 1984 legislation deleted the provision which allowed a resident defendant to transfer to his county of household and residence when there was no other defendant for whom venue was proper.[21]

The 1984 amendment to section 11-11-3 raises several points of concern, one of which centers around the inconsistency between statutory provisions for venue in circuit and chancery courts. The general venue statute for suits in chancery court[22]

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[19] MISS. CODE ANN. § 11-11-3 (Supp. 1988).

[20] *See id.*

[21] *See* Jefferson v. Magee, 205 So. 2d 281, 284 (Miss. 1967)(in transitory actions, if venue is proper for one material defendant it is proper for all); New Biloxi Hospital, Inc. v. Frazier, 245 Miss. 185, 192, 146 So. 2d 882, 884-85 (1962)(action is proper when brought in county where one defendant resides); Dukes v. Sanders, 239 Miss. 543, 557-58, 124 So. 2d 122, 127 (1960)(same).

[22] MISS. CODE ANN. § 11-5-1 (1972) provides as follows:

> Suits to confirm title to real estate, and suits to cancel clouds or remove doubts therefrom, shall be brought in the county where the land, or some part thereof, is situated; suits against executors, administrators, and guardians, touching the performance of their official duties, and suits for an account and settlement by them, and suits for the distribution of personalty of decedents among the heirs and distributees, and suits for the payment of legacies, shall be brought in the chancery court in which the will was admitted to probate, or letters of administration were granted, or the guardian was appointed; other suits respecting real or personal property may be brought in the chancery court of the county in

provides that transitory actions may be brought in the chancery court of any county where the defendant, or any necessary party defendant, may reside or be found. Justice Griffith, in his monumental work[23] on chancery court practice in Mississippi, describes the long-standing interpretation given to the statutory chancery venue language as follows:

> Suits wholly *in personam* must be filed in the county where one of the necessary parties defendant resides. It is true that the statute again uses the permissive word "may" in that connection, but it is the uniform policy of judicial procedure in our state to bring all litigation *in personam* to the home of the defendant, and the statute must be construed in the light of that policy . . . . It will be noted also that the statute would upon its face allow a suit in any county where one of the necessary parties *may be* found. In practice application this has reference only to non-residents of the state, and to those who have no fixed place of residence within the state. The statute holds no such intent as that a resident may be caught on the wing and sued in any county where he may be *temporarily found.*[24]

With the foregoing interpretation of the chancery venue statute, resident defendants in transitory actions in both circuit court and chancery court formerly had the right to fix venue in the county of their residence. Consequently, prior to the 1984 amendment to section 11-11-3, venue of such actions was treated the same in the circuit and chancery courts, even though the venue statutes for the respective courts were worded somewhat differently. This practice conformed to the venue scheme in most other states, in favoring defendants, as against plaintiffs, on the theory that the plaintiff, who controls the institution of the suit, might act oppressively in choosing the place of trial un-

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> which the property, or some portion thereof, may be; and all cases not otherwise provided may be brought in the chancery court of any county where the defendant, or any necessary party defendant, may reside or be found; and in all cases process may issue to any county to bring in defendants and to enforce all orders and decrees of the court.

Id.

[23] GRIFFITH, MISSISSIPPI CHANCERY PRACTICE (2d ed. 1950).

[24] *Id.* § 155; *see* Burgin v. Smith, 163 Miss. 797, 808-09, 141 So. 760, 762 (1932)(suits wholly in personam must be filed in resident county of one necessary party).

less restricted.[25] Accordingly, many state statutes provide for the convenience of resident defendants by mandating that transitory actions be brought in the county of the defendant's residence.[26]

The 1984 amendment to the Mississippi circuit court venue statute, however, seems to create a serious disparity in venue for transitory actions in circuit court, as opposed to chancery court. First, venue is now proper in circuit actions against resident individual citizens "in the county where the cause of action may occur or accrue," as well as in the county in which they may be found.[27] The legislature, however, did not amend the chancery venue provisions to give plaintiffs in chancery court this additional choice.[28] Second, the deletion from the circuit court venue statute of all language allowing the resident to transfer venue to the county of his residence raises intriguing questions regarding where and how a resident defendant may be "found" for circuit court venue purposes.

Let us examine a hypothetical situation wherein a resident citizen of DeSoto County, Mississippi, is involved in a two-car collision with a resident of Jackson County, Mississippi. We will postulate that the accident occurred in DeSoto County and that medical treatment was provided to the Jackson County resident in DeSoto County. Where is venue proper for a suit by the Jackson County resident against the DeSoto County resident under the amended circuit court venue statute? There are two choices provided under section 11-11-3. First, the plaintiff may properly commence the action in the county in which the cause of action occurred or accrued, which under these facts is DeSoto County.

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[25] Sunderland, *The New Illinois Civil Practice Act*, 1 U. CHI. L. REV. 188, 192 (1933). Party convenience and trial strategy are major considerations in venue selection. *Id.* To a lesser extent, convenience of witnesses may also be a consideration. *Id.* at 193. *See generally* J. FRIEDENTHAL, M. KANE, & A. MILLER, CIVIL PROCEDURE § 2.15 (1985).

[26] Sunderland, *supra* note 25, at 192.

[27] *See supra* note 19 and accompanying text.

[28] *See supra* note 24 and accompanying text. It may be worthy of note for purposes of attempting to divine legislative intent to observe that the 1984 amendment to MISS. CODE ANN. § 11-11-3 not only deleted the resident defendant's right to transfer transitory causes of action back to his county of household and residence, but also deleted the provisions that local actions involving land in two or more counties, wherein the defendant resided in one of the two counties, has to be brought in the defendant's county of residence.

Second, venue is proper in the county where the defendant "may be found." Now let us assume that our DeSoto County defendant has travelled on business to Pascagoula, in Jackson County, Mississippi, almost four hundred miles away from his home, and that while he is in Jackson County he is served with a summons and complaint for a five-million-dollar circuit court action filed by the Jackson County plaintiff in the Circuit Court of Jackson County. Because venue is proper where the defendant may be found, our resident defendant from North Mississippi may well be deemed to have been "found" for venue purposes down by the Gulf of Mexico. The following language from an oft-cited article by Vardaman Dunn underscores the probability of this result:

> Generally speaking, an individual . . . may be found in any county in which he is physically present for the service of process or in the county of his household and residence . . . .
>
> An individual defendant may be found in either one of two places. He may be found in the county of his domicile wherein he maintains his usual place of abode, since, if he is not physically present jurisdiction may be obtained by secondary service, or in the county where he is served personally with the process of the court, provided that he is served while physically present within the territorial boundaries of the county where the suit is pending and provided further that his presence is not the result of fraud or improper device chargeable to the plaintiff.[29]

Prior to 1984, the Desoto County defendant could have objected to the Jackson County venue and effected a transfer to his home by making application before the jury was impaneled.[30] Under the present version of section 11-11-3, however, there is no provision for a change of venue under our hypothetical set of facts. Is the Desoto County resident trapped in a county hundreds of miles away from home? Will he be forced to trial at the southern extreme of the state when the event in question occurred near the northern boundary of the state and when presumably both occurrence witnesses and medical witnesses will be located in Desoto County? The 1984 legislation points toward an affirmative answer to the preceding questions, but there is strong judicial language which raises some question. It will be recalled that Judge Griffith, in interpreting the phrase "may be found" in the chancery venue statute,[31] stated that "[t]he statute holds no such intent as that a resident may be caught on the wing and sued in any county where he may be temporarily found."[32] Through the years the Mississippi Supreme Court has protected the right of a resident to be sued in his home county by emphasizing the undue hardship and unnecessary expense to which defendants would be subjected if plaintiffs were granted unrestrained permission to select the sites of personal actions.[33]

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[29] Dunn, *Venue and Jurisdiction*, 30 Miss. L.J. 352, 356-57 (1959).

[30] Miss. Code Ann. § 11-11-3 (1972)(amended 1984) provided in pertinent part: "[I]f a citizen resident in this state shall be sued in any action, not local, out of the county of his household and residence . . . the venue shall be changed, on his application, before the jury is impaneled, to the county of his household and residence . . . ." *Id.*

In *Board of Trustees v. Van Slyke*,[34] which was decided after the 1984 amendment, the Mississippi Supreme Court reaffirmed in strong language the importance of the right of a resident citizen to be sued in his home county.[35] The majority of the *Van Slyke* court interpreted the chancery venue statute and the Mississippi Public Records Act of 1983 to hold that venue was proper only in Hinds County, where the Board of Trustees' central office and staff are maintained.[36] In support of its position that venue in Forrest County was inappropriate, the *Van Slyke* court considered the fact that none of the named defendants in the appellee's complaint resided in Forrest County.[37] Furthermore, the court noted that venue of all actions must be provided by statute.[38] Accordingly, after making the necessary statutory distinction between in personam actions and those concerning real or personal property, the court concluded that wholly in personam actions must be filed in the county where one of the necessary parties defendant resides.[39] Relying upon Justice Griffith's interpretation of the language of section 1274 of the Code of 1942, the court determined that although the statutory language was not definitive on the issue, the statute must be construed by the judiciary with deference to the policy of judicial procedure adhered to in the state, which is to bring all in personam litigation to the home of the defendant.[40] Thus, even though the defendant in question was a public body, the court unambiguously adhered to its view that a resident individual defendant should be afforded the right to be sued in his home county.[41]

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[31] MISS. CODE ANN. § 11-5-1 (1972). The wording of the statute significant to Judge Griffith's interpretation is as follows: "All cases not otherwise provided may be brought in the chancery court of any county where the defendant, or any necessary party defendant, may reside *or be found* . . . ." *Id.* (emphasis added).

[32] Griffith, *supra* note 23, § 155.

[33] *See* Gillard v. Great Southern Mtg. & Loan Corp., 354 So. 2d 794, 797-98 (Miss. 1978)(reiterating resident's right to be sued in his home county). In driving home its point, the *Gillard* Court set forth the following reasoning:

> Permission to plaintiffs to select the situs of personal actions, not local, would often work great hardship and disadvantage to defendants. Conceivably the suit might be filed in this state three hundred miles from the county of the residence of such a defendant, necessitating large outlay of money for travel and other expenses, to defend the suit with resulting inability of such defendant to procure attendance of witnesses at the trial.

Id. at 798 (quoting Bryant v. Lovitt, 231 Miss. 736, 742, 97 So. 2d 730, 731 (1957)).

[34] 510 So. 2d 490 (Miss. 1987).

[35] *Id.* at 492.

[36] *Id.* at 493.

In the light of this policy, what will the Mississippi Supreme Court do when faced with the hypothetical situation posed above? There appear to be several paths open to the court. Even though the 1984 amendment to section 11-11-3 deleted every reference to transfer of venue to a defendant's home county, the amended statute does conclude with this sentence: "If a civil action is brought in an improper county, such action may be transferred to the proper county pursuant to section 11-11-17."[42] The Mississippi Supreme Court might interpret the statutory phrase "improper county" to include our hypothetical problem where a resident is "caught on the wing" outside of his home county. However, it must be submitted that such a judicial interpretation would seem to ignore the major thrust of the 1984 amendment. The Mississippi Supreme Court has clearly acknowledged that establishing rules of venue is a legislative function;[43] therefore the court may simply declare that our Desoto County resident must defend the suit in Jackson County because that is what the legislature intended, and that any relief must come from the legislature. A third approach, one which seems to take a middle ground, would give trial judges discretion to transfer venue to accommodate the convenience of parties, witnesses, counsel and the courts. Such an approach is discussed in the following section.

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[37] *Id.* at 492.

[38] *Id.* (citing Miss. R. Civ. P. 82(b))(venue of all actions shall be provided by statute)); *see also* Griffith, *supra* note 23 § 151 (venue of suits in equity is governed entirely by statute).

[39] *Van Slyke*, 510 So. 2d at 492 (citing Griffith, Mississippi Chancery Practice § 155 (2d ed. 1950)).

[40] *Id.*; *see* State v. Massachusetts Bonding & Ins. Co., 187 Miss. 66, 72, 191 So. 285, 285 (1939)(statute does not confer jurisdiction, but fixes venue or locality where suits may be tried).

[41] *Van Slyke*, 510 So. 2d at 492-93.

[42] Miss. Code Ann. § 11-11-3 (Supp. 1988); *see supra* note 19 and accompanying text.

III. INTRASTATE FORUM NON CONVENIENS?

The doctrine of forum non conveniens recognizes "the discretionary power of a court to decline to exercise a possessed jurisdiction whenever it appears that the cause before it may be more appropriately tried elsewhere."[44] The doctrine developed in England as a common law remedy to protect defendants from plaintiffs who chose venue based on the desire to force the defendant to litigate in a distant and inconvenient forum.[45] The doctrine was recognized in American law in the early twentieth century[46] and gained general acceptance throughout the United States after its adoption by the Supreme Court in *Gulf Oil Corp. v. Gilbert*.[47] In this case, the plaintiff, a resident and business-man of Lynchburg, Virginia, filed a claim in the federal district court of the Southern District of New York, alleging that the defendant's careless handling of a gasoline delivery caused an explosion and fire which consumed the plaintiff's Lynchburg warehouse and the contents therein.[48]

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[43] *Van Slyke*, 510 So. 2d at 492 (Miss. 1987); *see supra* note 38 and accompanying text.

[44] Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1, 1 (1929).

[45] *See generally* Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380, 386-89 (1947)(doctrine of forum non conveniens is relied upon by English courts to prevent unnecessary hardship on defendant).

[46] F. JAMES & G. HAZARD, *supra* note 2, at 29 (2d ed. 1977). Although the logic behind the forum non conveniens doctrine began to receive general acceptance in the early twentieth century, prior to such time, it met with harsh judicial criticism. *Id.* The doctrine incurred such resistance because it was thought that courts have a duty to exercise jurisdiction whenever properly invoked. *Id.* For a detailed discussion on this argument, see Barrett, *supra* note 45, at 394-97.

[47] 330 U.S. 501 (1947).

After receiving notice of the pending New York action, the defendant, a Pennsylvania corporation qualified to conduct business in both New York and Virginia, invoked the doctrine of forum non conveniens, urging the district court to dismiss the action and arguing that Virginia was the appropriate forum for the case.[49] Persuaded by the arguments set forth by the defendant, the district court dismissed the action pursuant to the doctrine of forum non conveniens.[50]

In evaluating the propriety of the district court's dismissal, the Supreme Court considered various factors, such as the origin of the events giving rise to the litigation in Virginia, the feasibility of obtaining witnesses, and the avoidance of potential conflicts of laws problems.[51] On the basis of this analysis, the Court determined that the principle of forum non conveniens allowed the suit to be dismissed so that it might be brought in Virginia.[52]

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[48] *Id.* at 503.

[49] *Id.*

[50] *Id.* at 502.

[51] *Id.* at 508-09. The *Gulf Oil* court also elaborated on the private and public interests to be served by applying the doctrine of forum non conveniens in the following classic language:

> An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. . . .
>
> Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation . . . . There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

Id. at 508-09.

[52] *Id.* at 511-12. The court defined the principle of forum non conveniens as the

This conclusion was reached in spite of the fact that the venue statutes of the United States permitted the plaintiff to commence the action in New York.[53] Thus the English doctrine was formally accepted in the United States as a valid exercise of judicial discretion to be invoked by courts to resist the imposition of jurisdiction upon them when the cause could be tried more appropriately elsewhere.[54]

The Mississippi Supreme Court adopted the principles of the forum non conveniens doctrine as early as 1943,[55] and up to this time the doctrine has been a focal point of the current controversy concerning suits brought in Mississippi to take advantage of the six-year general statute of limitations[56] in this state.[57]

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right a court has to resist imposition upon its jurisdiction even when jurisdiction is authorized by the "letter of a general venue statute." *Id.* at 507.

[53] *Id.* at 504.

[54] *Id.* at 509-12. For additional reference, see F. JAMES & G. HAZARD, *supra* note 2, at 12.29.

[55] *See* Strickland v. Humble Oil & Refining Co., 194 Miss. 194, 201-05, 11 So. 2d 820, 822-23 (1943)(doctrine of forum non conveniens discussed and applied). *But cf.* Vick v. Cochran, 316 So. 2d 242, 245 (Miss. 1975) (forum non conveniens has not been adopted in Mississippi).

[56] MISS. CODE ANN. § 15-1-49 (1972)(amended 1989). Section 15-1-49 provided in pertinent part: "[A]ll actions for which no other period of limitation is prescribed shall be commenced within six years next after the cause of such action accrued. . . ." *Id.* See Shewbrooks v. A.C. and S., Inc., 529 So. 2d 557 (Miss. 1988) for a detailed analysis of the pros and cons regarding the present Mississippi policy of opening the courts of the state to litigation wherein the only contact to Mississippi is that the defendant or defendants are amenable to suit in Mississippi. The *Shewbrooks* factual situation clearly exemplifies the class of lawsuits at issue. In *Shewbrooks*, the plaintiffs, who were Delaware residents, filed an action in Mississippi founded upon alleged asbestos poisoning received in Delaware, New Jersey, and Pennsylvania (all states in which the applicable period of limitation had expired). *Id.* at 559, 568. In a five-to-four decision, the *Shewbrooks* majority ruled that it was an abuse of discretion for the trial judge to dismiss the Shewbrooks claim under the doctrine of forum non conveniens when there was no other forum where the statute of limitation had not expired. *Id.* at 562-64. Justice Robertson, in a dissent joined by Justices Prather and Anderson, argued for application of the conflicts of laws/center of gravity test to determine which limitation period would be applied. *Id.* at 568. Obviously, the center of gravity approach would bar the Shewbrooks claim. *Id.* at 570. Justice Anderson, in a dissent joined by Justices R.N. Lee and Robertson, approved the trial judge's forum non conveniens dismissal, relying upon the reasoning that the requirements of forum non conveniens are satisfied if the defendants are *amenable to process* in another forum, without regard to the possibility of a statute of limitations bar in such alternate forums. *Id.* at 574-76.

[57] Author's Note: At press time, § 15-1-49 had been amended by the Mississippi Legislature to shorten the statute of limitations period from six years to three years,

A perusal of the Supreme Court's considerations in *Gulf Oil* reveals that most of the criteria examined to make interstate forum non conveniens decisions may be applied just as readily to intrastate requests for change of venue.[58] Not surprisingly, a growing number of states have adopted procedures permitting the trial court to order transfer of venue based upon factors of convenience to witnesses, parties, attorneys, and the court.[59]

The Mississippi Supreme Court has not actually approved a transfer from one county where venue is proper to another county where venue is proper over objection by the plaintiff based solely on matters of convenience, but there are strong indicators that intrastate forum non conveniens may be available for use at the sound discretion of Mississippi trial judges. In the 1977 decision of *Illinois Central Gulf R.R. v. Stedman*,[60] the Mississippi Supreme Court was faced with one of the many

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effective July 1, 1989.

[58] *Gulf Oil*, 330 U.S. at 508-09 (1947). *See supra* note 51 and accompanying text. *But see* Miss. Code Ann. § 15-1-65 (Supp. 1988)(amended 1989)(to be effective on and after July 1, 1989) which provides as follows:

> When a cause of action has accrued outside of this state, and by the laws of the place outside this state where such cause of action accrued, an action thereon cannot be maintained by reason of lapse of time, then no action thereon shall be maintained in this state; provided, however, that where such a cause of action has accrued in favor of a resident of this state, this state's law on the period of limitation shall apply.

Id.

[59] *See* Gas Properties, Inc. of Ariz. v. Farley, 14 Ariz. App. 158, 481 P.2d 526, 528 (1971) (statutory change of venue for convenience of witnesses vested in discretion of trial judge); Seybert v. County of Imperial, 139 Cal. App. 2d 221, 293 P.2d 135, 138 (1956) (change of venue granted pursuant to statute for convenience of witnesses and promotion of justice); State Dept. of Highways v. District Court of Denver, 635 P.2d 889, 891 (Colo. 1981) (statutory change of venue for convenience vested in discretion of trial judge); Florida Patient's Comp. Fund v. Florida Physicians' Ins. Reciprocal, 507 So.2d 778, 779 (Fla. Dist. Ct. App. 1987) (statutory change of venue for convenience vested in discretion of trial judge); Degraw v. Flowers Trans., Inc., 167 Ill. App. 3d 491, 521 N.E.2d 115, 118 (1988)(abuse of discretion to deny transfer of venue based on forum non conveniens when forum county has no relevant connection with litigation), *appeal denied*, 121 Ill. 2d 568, 526 N.E.2d 828 (1988) ; Vick v. State, 356 So. 2d 523, 524 (La. Ct. App. 1977) (change of venue allowed under doctrine of forum non conveniens); McReynolds v. Benner Township, 118 Pa. Commw. 215, 544 A.2d 566, 567 (1988) (plaintiff's right of forum choice not absolute in light of public interest in judicial economy); Smith v. Atlantic Coastline R.R., 218 S.C. 481, 63 S.E.2d 311, 313 (1951) (change of venue granted when no witnesses resided in forum county).

[60] 344 So. 2d 468 (Miss. 1977).

cases which as a group formed the "Smith County Phenomenon"[61] of the 1970's. For reasons known only to the plaintiffs and their attorneys, beginning in about 1970, a very large percentage of the damage suits filed in Mississippi against railroads, power companies, and the other named utilities or public carriers pursuant to the Mississippi Railroad Venue Statute[62] were commenced in Smith County, Mississippi. The then-applicable venue statute permitted such suits "in any county in which part of such railroad, express line or route, steamboat way, power, superpower, telephone or telegraph line or motor transportation line or route may be."[63] The *Stedman* case was typical of the "Smith County Phenomenon," as the only relation the *Stedman* case had to Smith County was the fact that the Illinois Central Gulf Railroad had a line through Smith County.[64] Although the case was reversed on other grounds,[65] the court seemed to acknowledge the efficacy of the intrastate forum non conveniens argument in the following dictum:

> Appellants also urge that the trial court was in error in failing to sustain their motion to dismiss this cause under the doctrine of the *forum non conveniens*, or in the alternative grant a change of venue. The trial court after hearing testimony on the motion overruled it, although none of the parties or witnesses were residents of Smith County. Although we cannot say that the trial court abused its discretion in this regard, however, on remand the trial court should again consider the motion in light of the testimony given and the circumstances now existing, and if it finds that it is proper to do so, transfer the cause to a more convenient forum.[66]

The "Smith County Phenomenon" ended in 1979 when the legislature amended the Railroad Venue Statute to limit plaintiff's venue choices to three sites, each of which has some nexus to the parties or action.[67] Nevertheless, the Court has again mentioned fixing venue for convenience in *Board of Trustees v. Van Slyke*.[68] The *Van Slyke* opinion is important to this forum non conveniens discussion because of certain language contained in the dissenting opinion. In her dissent Justice Prather indicated that since there was not a statute specifically fixing the venue for a lawsuit against the College Board, then other more general venue statutes should apply,[69] but the dissent added that there is nothing to "preclude the Board's application for, nor a trial court's granting, a change of venue to a forum of convenience."[70] Furthermore, according to the dissent, relevant factors to be weighed in determining whether to order a forum non conveniens include record transfer; the convenience of witnesses, parties, and staff; and community resources for lodging.[71]

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[61] The designation is solely that of the author.

[62] Ch. 121, 1930 Miss. Laws. The Mississippi Railroad Venue Statute has since been repealed. The current statute applicable is MISS. CODE ANN. 11-11-5 (Supp. 1988).

[63] *Id.*

[64] The court observed that none of the parties or witnesses were residents of Smith County. *Stedman*, 344 So. 2d at 470.

[65] *Id.* at 470. The trial court had given erroneous jury instructions about the legal speed limit for the train. *Id.*

[66] *Id.* at 471.

The author submits that the references to transfer of venue for convenience made in *Stedman* and *Van Slyke* are sufficient authorization for state trial judges in Mississippi to exercise a discretionary right to transfer venue to another county where venue is also proper. However, in order for such a transfer to be made available to the Desoto County defendant "caught" in Jackson County in our hypothetical, another piece must be added to the puzzle. As explained above, forum non conveniens is available only when there are two or more forums available. A transfer of venue from Jackson County to the home county of the defendant implicitly acknowledges that venue in a transitory cause of action is always proper in a resident defendant's county of residence. There is no doubt that such was the state of the law[72] before the 1984 amendment to the circuit court venue statute, and this author suggests that giving trial judges discretion to continue the long-standing practice of transfer to a defendant's home county (albeit now only in appropriate circumstances instead of as a matter of right) will further the administration of justice.

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[67] Miss. Code Ann. § 11-11-5 (Supp. 1988) provides:

> Actions against any railroad, express, steamboat, power, superpower, telegraph or telephone corporation, or against individuals owning, managing, operating or controlling a railroad, express line or route, steamboat, power, superpower, telephone or telegraph line, or against any corporation or individuals owning, managing, operating or controlling a motor transportation line for the conveyance of passengers, freight or express, for hire, over the highways in the State of Mississippi, may be brought in the county where the cause of action accrued, in the county where the defendant has its principal place of business or in the county in which the plaintiff resides.

Id.

[68] 510 So. 2d 490 (Miss. 1987).

[69] In *Van Slyke*, the dissent addressed the venue issue as follows:

> In the absence of a specific statute for the filing of suit against the College Board, I conclude that venue is controlled either by the general venue statute, Miss. Code Ann. § 11-5-1 (Supp. 1986), which prescribes that venue is proper where the defendant "resides or may be found," or by the Public Meetings Act, Miss. Code Ann. § 25-61-13(1) (Supp. 1986), which prescribes that venue is proper "where the public body is located." Under either interpretation the Board can be said to "reside", "be found," or "be located" in Forrest County and there, venue is proper.

Id. at 494-95 (Prather, J., dissenting).

[70] *Id.* at 495.

[71] *Id.*

Having thus advocated intrastate forum non conveniens, the author hastens to say that the mere existence of this doctrine in Mississippi may be questioned in spite of the *Stedman* and *Van Slyke* language quoted above. Mississippi has long recognized the plaintiff's right to choose venue when more than one county is appropriate,[73] and such a right of selection by the plaintiff has been carried forward into the Mississippi Rules of Civil Procedure.[74] There is precedent in other states for either recognizing the doctrine judicially or requiring legislative authority. The Florida courts refused to utilize intrastate forum non conveniens[75] until granted such authority by the Florida legislature.[76] The Illinois courts, on the other hand, felt no need for enabling legislation and judicially declared that Illinois state circuit court judges have the discretionary power to transfer a case to a different county where the doctrine of forum non conveniens applies.[77]

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[72] Dunn, *supra* note 29, at 356.

[73] *See, e.g.*, Mississippi Power Co. v. Luter, 336 So. 2d 753, 754 (Miss. 1976)(venue proper in any county in which power company has power line).

[74] MISS. R. CIV. P. 82(d) states: "The plaintiff shall have the right to select the court to which the action shall be transferred in the event the action might properly have been filed in more than one court." *Id.*

[75] *See* Atlantic Coast Line R.R. v. Ganey, 125 So. 2d 576, 580 (Fla. Dist. Ct. App. 1961)(trial judge has no authority to transfer action to another court for purposes of trial convenience); Note, *Venue: Forum Non Conveniens - The Florida View*, 15 U. MIAMI L. REV. 420 (1961)(doctrine of forum non conveniens not available when invoked to effectuate intrastate change of venue).

[76] FLA. STAT. ANN. § 47. 122 (Supp. 1988) provides: "For the convenience of the parties or witnesses or in the interest of justice, any court of record may transfer any civil action to any other court of record in which it might have been brought." *Id.*

Recognition of the doctrine will allow trial courts to better serve litigants, witnesses and the justice system in general; and such benefits would, in all likelihood, be obtained without any serious disruption of a plaintiff's basic right to choose venue when more than one site is appropriate.

IV. Waiver of Objections to Venue by Failure To Appear

Mississippi, like virtually all of the other states, has had difficulties through the years in determining when venue should be treated as jurisdictional.[78] Local actions are the classic examples of venue being made jurisdictional, and restricting such trials solely to the county where the land is located has caused no problems, because such a practice is practical, convenient, and familiar[79] as a result of its long historical underpinnings. On the other hand, giving jurisdictional effect to venue decisions in transitory causes of action has been the cause of great confusion and uncertainty throughout the United States in general,[80] and in Mississippi in particular.

The major point of unrest in Mississippi through the years has been caused by the inability of the Mississippi Supreme Court to settle upon one final answer to a basic question. Stated generally, the question has been simply whether a plaintiff may commence a transitory cause of action in a county in which venue is not proper, effect service of process upon the defendant(s) in another county (usually the home county of a resident defendant), and then take a valid default judgment if the defendant does not make a timely response. There is no question that the defendant waives any objection to venue if he appears and does not object to the improper venue;[81] therefore the question at issue has merely been whether a failure to respond to a transitory cause of action commenced in an improper county will operate as a waiver by the defendant of any venue objection.

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[77] *See* Torres v. Walsh, 98 Ill. 2d 338, 456 N.E.2d 601, 608 (1983)(courts exercise discretion in interest of fair play); Note, *Forum Non Conveniens - Illinois Judges Granted Authority to Curb Intrastate Forum Shopping*, 1983 S. Ill. U.L.J. 395, 410-12 (discussion of perceived good and bad factors pertaining to adoption of intrastate forum non conveniens).

[78] *See* Stevens, *supra* note 1, at 316-25 (inconsistencies in venue requirement). Part of the problem of determining when venue should be treated as jurisdictional derives from careless statute drafting. *Id.* at 317.

[79] *Id.* at 315.

[80] *See id.* at 319 & n.56. Recognizing that an imprecisely drafted venue provision may also have a direct bearing on jurisdiction, a lawyer who objects to venue but fails to do so in a timely manner may still challenge a given action on the basis that the court lacks competent jurisdiction to hear the case. *Id.* at 319.

Unfortunately, the Mississippi Supreme Court has spent the last twenty years vacillating as to the correct response to this basic question. In the late 1800's the court had determined that a resident could not be sued out of his home county in that manner and that any such default judgment could be set aside as null and void.[82] That position was reaffirmed in 1957,[83] but in 1970 the court reversed itself, ruling that the resident's failure to make a timely objection to venue operated as a waiver of any such objection, and upheld the default judgment in question.[84] Great confusion was engendered by the fact that the 1970 decision neither overruled nor mentioned the two earlier precedents.[85] In 1978, the Mississippi Supreme Court attempted to reconcile the irreconcilable when it announced that the position asserted in 1957 was actually the state of the law — that is, that the transitory action had to be commenced in a proper county in order to secure an enforceable default judgment.[86]

The most recent, and, it is hoped, the final word on this issue was pronounced in 1985 in *Belk v. State Department of Public Welfare*,[87] wherein the Mississippi Supreme Court held that a resident individual citizen waived objection to venue by not responding to service of process made upon him in his home county (Clay County) for the paternity suit commenced in Lowndes County.[88] Even though *Belk* involves the specialized paternity proceeding in chancery court, the opinion discusses the waiver of venue problem in a general manner and with the following language points to the Mississippi Rules of Civil Procedure as controlling authority:

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[81] *See, e.g.*, King v. Ainsworth, 225 Miss. 248, 250, 83 So. 2d 97, 98 (1955)(defendant's participation in trial without objection to venue constituted waiver).

[82] *See* Campbell v. Triplett, 74 Miss. 365, 367, 20 So. 844, 844 (1896)(if defendant is not served with process in county in which suit is brought, jurisdiction of court does not attach).

[83] Bryant v. Lovitt, 231 Miss. 736, 745-46, 97 So. 2d 730, 733 (1957).

[84] Wofford v. Cities Service Oil Co., 236 So. 2d 743, 746 (Miss. 1970). The court in *Wofford* found that since one and one half years had elapsed from the time of default judgment until the filing of the motion to vacate for lack of jurisdiction, the defendant had in effect waived any objection he might have had to venue. *Id.*

[85] *See* Note, *A Question of Venue*, 43 MISS. L.J. 130 (1972)(critical analysis of *Wofford* decision and authorities cited therein).

[86] Gillard v. Great Southern Mtg. & Loan Corp. 354 So. 2d 794, 798 (Miss. 1978). The court held that the defendant will not be deemed to have waived venue by failing to object unless the plaintiff has acted in good faith. *Id.* at 798.

> Of great importance in this case is the fact that this entire action was brought after the effective date of the Mississippi Rules of Civil Procedure. This importance is apparent when the rules regarding venue are examined. Rule 82(d) deals with improper venue. The thrust of the rule is that when an action is filed laying venue in the wrong county, the action shall not be dismissed, but the court, on timely motion, shall transfer the action to the court in which it might properly have been filed and the case shall proceed as though originally filed therein. The expenses of the transfer shall be borne by the plaintiff.
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> . . . .
>
> [T]he putative father has a right to have the case heard in the county in which he resides, if he is a resident of the State of Mississippi. *The defendant must timely assert that right via a Rule 12(b)(3) motion, and his failure to do so amounts to a waiver.* This is consistent with our pre-Rules case of *Wofford v. Cities Service Oil Co.*, 236 So. 2d 743 (Miss. 1970). Foreshadowing the approach taken by our Rules of Civil Procedure, *Wofford* announced the principle that venue is waived where a defendant does not timely apply for a transfer. Here, as in *Wofford*, there is no suggestion that the action was filed in Lowndes County to invoke the jurisdiction of its Court to the detriment of the Clay County defendant. In fact, the same

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[87] 473 So. 2d 447 (Miss. 1985). The Mississippi Supreme Court has since cited *Belk* with approval and reaffirmed its principles. Atwood v. Hicks, No. 58,687, slip op. at 5 (Miss. Jan. 11, 1989).

[88] *Id.* at 448. The remedy for a defendant who objects to venue is to respond to the service of process and move to transfer the action, at plaintiff's expense, to the proper county. *Id.* at 450.

> chancellor presides in Clay County that presided over this trial in Lowndes County.
>
> For the reasons stated the chancellor was correct in his finding that venue was waived because Belk did not timely object to the improper venue. Rules 12(b)(3) and 12(h)(1), Miss. R. Civ. P. The decision of the chancery court is, therefore, affirmed.[89]

Assuming there are no further radical peregrinations by the Mississippi Supreme Court on this important point, the burden is now upon any defendant sued on a transitory cause of action in an improper venue to make a timely motion to transfer venue[90] or any objection to venue will be deemed to be waived. Phrased differently, since the *Belk* decision in 1986, venue in such transitory actions is given no jurisdictional effect.

In this author's opinion, *Belk* is a step in the right direction, with the goal being the injection of as much simplicity and certainty as possible into the task of selecting venue. The *Belk* approach takes away the potential of the after-the-judgment attack based upon the "venue-was-jurisdictional" argument. Much can be said for ensuring that "final judgments" are truly final.

CONCLUSION

The stated purpose of this article is to conduct an analysis of the status of venue for transitory causes of action in Mississippi and to make some suggestions for change. The author has no preference whatsoever regarding venue choices by types of actions or by classes of defendant. The entire thrust of this argument is toward encouraging the legislature and courts to establish a venue scheme that is simple and certain. The following thoughts are offered to aid in establishing improved venue procedures. First, venue rules should be brought together into one comprehensive chapter of the code which will govern venue for suits in circuit, chancery, and county courts. Such unification will help in avoiding problems such as the one discussed above where venue is apparently proper in the county where the cause of action occurred or accrued in circuit court,[91] but not in chancery court.[92] Second, the *Belk* approach regarding waiver of objections to venue should be codified and strengthened. The concept of venue as an aspect of jurisdiction should be limited solely to local actions. Plaintiffs should be permitted to commence transitory actions in any county in the state and serve the defendant or defendants wherever they may be found. The Mississippi Rules of Civil Procedure give defendants ample protection from abuse by shifting all expenses caused by filing in improper venue to the plaintiff.[93]

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[89] *Id.*

[90] The motion is made subject to MISS. R. CIV. P. 12(b)(3), and all expenses of the transfer must be borne by the plaintiff pursuant to MISS. R. CIV. P. 82(d).

The current statutory provisions for suits "where the cause of action occurred or accrued" or "where defendant may be found" are traditional, but as discussed above, the "where . . . found" language has occasioned much confusion, especially with regard to the right, if any, of a resident to be sued in his home county.[94] The legislature should state explicitly whether a resident citizen has any right to be sued or "be found" in his county of residence, especially since the legislative and judicial views on this point seem to be diverging.[95] Recognition of an intrastate version of forum non conveniens might best be handled as part of the statutory venue scheme.

Attorneys, judges, and litigants deserve a simple and clear scheme of venue, with the aim toward making final judgments truly final, at least with regard to venue objections. The author submits that the few statutory changes suggested above would improve a venue scheme which has become needlessly complex through the years.

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[91] Miss. Code Ann. § 11-11-3 (Supp. 1988). *See supra* text accompanying notes 20 and 28.

[92] Miss. Code Ann. § 11-5-1 (Supp. 1988). *See supra* notes 22, 28 and accompanying text.

[93] *See supra* note 89 and accompanying text.

[94] *See supra* text accompanying notes 30-33.

[95] Compare the discussion of the 1984 amendment to Miss. Code Ann. § 11-11-3 (Supp. 1988) with Board of Trustees v. Van Slyke, 510 So. 2d 490 (1987). *See supra* text accompanying notes 20-21 & 34-41.

HABEAS CORPUS: THE "GREAT WRIT" IN MISSISSIPPI STATE COURTS

*James D. Bell**

BRIEF STATEMENT OF PURPOSE OF THE WRIT

> A habeas corpus proceeding has but one purpose, that is to set at liberty persons illegally held . . . [This is accomplished] by entering an order discharging the prisoner, granting bail, or . . . delivering a child to the rightful custody of persons who are properly entitled to the care and custody of the child.[1]

I. ORIGINS

A precise date on the origin of the writ of habeas corpus has not been ascertained, although it is believed to pre-date the Magna Charta of 1215. The writ was used by the King to exercise his "right to inquire the causes for which any of his subjects are deprived of their liberty."[2] After 1215, the writ was used to effect the principle created in the Magna Charta that prohibited imprisonment without due process of law.[3]

Its use over the centuries in protecting personal security and individual liberty has caused the writ of habeas corpus to be variously referred to as the "freedom writ," "liberty writ," the "great writ," or simply "the writ." It has also been called "the highest remedy in law, for any man that is imprisoned."[4] The writ's importance within the United States was described by the United States Supreme Court in *Smith v. Bennett*[5] as follows:

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Author's Note: The writ of habeas corpus ad subjiciendum in state courts of Mississippi is the subject of this article. Use of the writ in federal court is not covered.

[1] State v. Ridinger, 279 So. 2d 618, 619 (Miss. 1973).

[2] 6 ENCYCLOPAEDIA OF THE LAWS OF ENGLAND 469-70 (2d ed. 1907).

[3] 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 112 (1926).

> Ever since the Magna Charta, man's greatest right - personal liberty - has been guaranteed, and the procedures of the Habeas Corpus Act of 1679 gave to every Englishman a prompt and effective remedy for testing the legality of his imprisonment. Considered by the Founders as the highest safeguard of liberty, it was written into the Constitution of the United States that its 'privilege . . . shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.' . . . Over the centuries it has been the common law world's 'freedom' writ by whose orderly processes the production of a prisoner in court may be required and the legality of the grounds for his incarceration inquired into, failing which the prisoner is set free. We repeat what has been so truly said of the federal writ: 'there is no higher duty than to maintain it unimpaired,' and unsuspended, save only in the cases specified in our Constitution.[6]

Indeed, throughout the centuries, the great writ has been the shield of personal freedom insuring liberty to persons illegally detained.

II. CONSTITUTIONAL SOURCES

"The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[7]

The writ has appeared in all four Mississippi Constitutions, with language even stronger than that which appears in the Federal Constitution. Mississippi's present constitution provides that "[t]he privilege of the writ of habeas corpus shall not be suspended, unless when in the case of rebellion or invasion, the public safety may require it, nor ever without the authority of the legislature."[8] In the United States Constitution it is not clear who would suspend the "privilege of the writ." In Mississippi, only the legislature may suspend the writ.[9]

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[4] *See* 3 Car. 1 *reprinted in* 3 HOWELL'S STATE TRIALS 95 (1809) (proceedings in parliament relative to liberty of subject, 1628).

[5] 365 U.S. 708 (1961).

[6] *Smith*, 365 U.S. at 712-13 (quoting U.S. CONST. art. I, § 9 and Bowen v. Johnston, 306 U.S. 19, 26 (1939)).

[7] U.S. CONST. art. I, § 9, cl. 2.

III. Statutory Sources and Court Rules

Sections 11-43-1 through 11-43-55 of the Mississippi Code define habeas corpus practice in Mississippi. Rule 8.07 of the Uniform Criminal Rules of Circuit Court Practice (hereinafter U.C.R.C.C.P.) consolidates and simplifies the statutory requirements to the extent that they apply to cases related to criminal charges.[10]

Habeas corpus is no longer a post-conviction remedy in Mississippi. The Mississippi Uniform Post-Conviction Collateral Relief Act,[11] enacted in 1984, has replaced habeas corpus as the method for relief after conviction. For practical everyday applications, the portion of Rule 8.07 of the U.C.R.C.C.P. that deals with post-conviction relief should be ignored unless and until the Mississippi Supreme Court rules that the legislature has infringed on the inherent power of the court to promulgate rules of procedure, and trammelled the basic tenets of separation of powers.[12] It can be argued that the legislature has attempted to restrict, or suspend, the application of the writ by prohibiting its use by persons illegally detained after conviction. On the other hand, the Mississippi Uniform Post-Conviction Collateral Relief Act can be described as post-conviction habeas corpus renamed. So long as relief is afforded to persons illegally detained, the courts may choose not to argue over nomenclature.[13] Consequently, post-conviction habeas corpus cases are of some prescriptive value for evaluation of post-conviction collateral relief claims.

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[8] Miss. Const. art. 3, § 21.

[9] *Id.*

[10] Miss. Uniform Crim. R. Cir. Ct. Practice 8.07 [hereinafter U.C.R.C.C.P.].

[11] Miss. Code Ann. §§ 99-39-1 to -29 (Supp. 1987). The stated purpose of the act is to:

> [R]evise, streamline and clarify the rules and statutes pertaining to post-conviction collateral relief law and procedures, to resolve any conflicts therein and to provide the courts of this state with an exclusive and uniform procedure for the collateral review of convictions and sentences. Specifically, this chapter repeals the statutory writ of error coram nobis, supercedes Rule 8.07 of the Mississippi Uniform Criminal Rules of Circuit Court Practice and abolishes the common law writs relating to post-conviction collateral relief, including by way of illustration but not limitation, error coram nobis, error coram vobis, and post-conviction habeas corpus . . . . The relief formerly accorded by such writs may be obtained by an appropriate motion under this chapter. The enactment of this chapter does not affect any pre-conviction remedies.

Id. § 99-39-3(1). *See also* Miss. Code Ann. § 11-43-3 (Supp. 1988)(habeas corpus shall not apply to collateral relief sought following conviction of crime).

The act provides grounds for relief for a variety of claims, including many that formerly fell within the purview of post-conviction habeas corpus. Specifically, the act provides a remedy for "[a]ny prisoner in custody under sentence of a court of record of the State of Mississippi who claims," among other things, that the trial court imposed sentence without the benefit of jurisdiction, or that the statute providing for conviction or sentencing was unconstitutional. Miss. Code Ann. § 99-39-5(1) (Supp. 1987).

Because of the importance of the writ and its emergency nature, it can be issued by any supreme court justice, circuit judge, county judge, or chancellor. The writ can be made returnable and triable before the judge who signs the writ, or any other judge in the proper venue.[14] Habeas corpus actions are given priority settings and can be heard on three days notice, or less in a proper case.[15] The writ is obtained by making a "Petition for Writ of Habeas Corpus" and presenting it to a judge of any court except a justice court or city court.[16] If it is obvious from

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[12] *See* Newell v. State, 308 So. 2d 71, 76-78 (Miss. 1975)(power of court to promulgate rules); Order Adopting the Mississippi Rules of Civil Procedure, MISSISSIPPI RULES OF COURT 216 (West 1987)(supremacy of court rules over legislative rules concerning procedure); MISS. R. CIV. P. 81 (h)(statement of statutes supplanted by rules); MISS. R. EVID. 1103 (repealing statutes inconsistent with rules).

[13] The Mississippi Supreme Court appears to have adopted the position that the Post-Conviction Collateral Relief Act operates to codify existing limitations on judicial review, and that substantive considerations have not been altered. Irving v. State, 498 So. 2d 305, 308-09 (Miss. 1986).

[14] MISS. CODE ANN. §§ 11-43-7, 9-9-23 (1972).

[15] U.C.R.C.C.P. 8.07.

[16] *Id.* Requisites for the petition include:

> (1) The petition for the writ of habeas corpus shall be in writing, sworn to and signed by the person for whose relief it is intended, or by someone in his behalf, and shall contain the following matters:
>
> > (a) A description of where and by whom the petitioner is deprived of his liberty [or by whom rightful custody is denied], and (b) The facts and circumstances of the restraint, [or denial of rightful custody], and (c) The form of the relief sought, and (d) The grounds upon which relief is sought, and (e) If desired, a request for a copy of transcripts of any prior proceeding if the petitioner qualifies as an indigent under MISS.CODE

the petition that the petitioner is entitled to no relief, the judge should enter an order denying the writ. However, if the petitioner, traditionally called "the relator," properly alleges unlawful detention or denial of rightful custody, the writ should be granted.[17] The writ requires the respondent to produce a person in court and show cause why the respondent detains that person. Further, the respondent is required to file a written answer, under oath.[18]

In cases involving criminal charges, the full range of civil discovery is available to the parties involved in a habeas corpus action at the judge's discretion.[19] In other actions, discovery is available to the same extent as in any civil case. Generally, however, time constraints prevent extensive discovery.

Habeas corpus was considered so vital to the preservation of liberty that the legislature made it a "high misdemeanor" for a judge to refuse to grant a writ "when required by law to do so," and any clerk who fails to immediately issue a writ when ordered to do so can be removed from office and made civilly liable to the aggrieved party.[20] If a respondent fails to produce the person as required by the writ, he forfeits $1,000.00 to the person not produced and is subject to punishment for contempt of court.[21]

At the habeas corpus trial, the judge "shall inquire into the cause of imprisonment or detention."[22] Moreover, Rule 8.07 of the U.C.R.C.C.P. requires the judge to "inquire into all the allegations set forth in the answer."[23] Once detention has been admitted or established in cases involving criminal charges, the

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Ann. § 99-15-15 (1972), specifying what portions are necessary to decide the issues.

Id.

[17] *Id.* The judge may order the clerk to issue the writ or he may issue it himself. Miss. Code Ann. § 11-43-15 (1972). Counsel may be appointed to represent indigents. Miss. Code Ann. § 99-15-15 (1972); U.C.R.C.C.P. 8.07(2).

[18] Miss. Code Ann. § 11-43-29 (1972); U.C.R.C.C.P. 8.07. In practice, the requirement of a written answer has not been enforced in Hinds County and Circuit Courts when the respondent has been required to appear in court on short notice.

[19] U.C.R.C.C.P. 8.07.

[20] Miss. Code Ann. § 11-43-15 (1972).

[21] Miss. Code Ann. § 11-43-31 (1972).

[22] Miss. Code Ann. § 11-43-33 (1972).

[23] U.C.R.C.C.P. 8.07.

general practice is to require the State to proceed first and show cause for detention.[24] The logic in requiring the respondent to proceed first lies in the natural presumption that all persons are entitled to their liberty, unless there is cause to deny it.[25] It should be noted that rules of evidence are arguably relaxed in some habeas trials. "Whenever the personal attendance of a witness cannot be procured, his affidavit, taken on reasonable notice to the adverse party, may be received in evidence."[26] Rule 1101(b)(3) of the Mississippi Rules of Evidence appears to exclude habeas hearings involving criminal charges without specifically referring to habeas corpus.[27]

Since habeas corpus hearings encompass all of the hearings listed in Rule 1101(b)(3), it can be contended that the rules of evidence are not applicable. Caution should be exercised by the trial judge to insure that sufficient cause exists for the relaxation of rules of evidence, and that a fair hearing can be had by both sides. Rule 1101(b)(3), if abused, could gut habeas corpus and make it a worthless rubber stamp proceeding. Prudence would seem to dictate that the Mississippi Rules of Evidence be used unless good cause is shown for a departure from usual evidentiary requirements and safeguards.

After hearing evidence as to the cause of imprisonment, the court can discharge, commit, remand, or grant bail to a prisoner, or award custody to the proper person. If the court finds that a prisoner was improperly charged with a crime but should be properly charged with another crime, then the judge may so charge him and commit, remand, or grant bail to him as in other cases.[28]

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[24] MISS. CODE ANN. § 11-43-33 (1972).

[25] *Id.*; *see* Slade v. State, 119 So. 355, 356 (1928)(only where officer makes out prima facie case is burden on petitioner).

[26] MISS. CODE ANN. § 11-43-39 (1972).

[27] MISS. R. EVID. 1101(b)(3). In pertinent part, the rule provides:

> Except for the rules pertaining to privileges, these rules [of evidence] do not apply in the following situations:
>
> (3) *Miscellaneous Proceedings.* Proceedings for extradition or rendition; probable cause hearings in criminal cases and youth court cases; . . . and proceedings with respect to release on bail or otherwise.

Id.

[28] MISS. CODE ANN. §§ 11-43-5 to -33 (1972 & Supp. 1987); U.C.R.C.C.P. 8.07.

A judgment rendered in a habeas corpus action is final until reversed and bars other habeas actions on the same issues.[29] Appeals from habeas judgments may be made directly to the supreme court by either party.[30]

IV. Scope

The writ of habeas corpus is limited in its scope. The underlying purpose is to set at liberty persons illegally held or to deliver custody of any person to the proper custodian.[31] Denials of a petition for habeas corpus generally fall within two broad, interrelated categories: The petitioner has attempted to expand the scope of habeas corpus beyond its recognized limits, or alternatively, the petitioner has impermissibly attempted to use habeas corpus as a substitute for appeal.

In *Ex parte Grubbs*,[32] the petitioner was convicted in justice court of exhibiting a concealed weapon and sentenced to work for a convict contractor.[33] He filed a writ of habeas corpus claiming that the several affidavits upon which he was convicted did not charge a crime.[34] His writ was denied because the justice court had jurisdiction to try misdemeanors, a misdemeanor was the intended charge, and having tried, convicted and passed sentence on Grubbs, the judgment was presumed correct.[35] The proper recourse for petitioner Grubbs was an appeal, not habeas corpus.[36]

The conviction of the Mississippi Supreme Court in maintaining this boundary between the habeas corpus proceedings and the appellate process is illustrated in the case of *State v. Ridenger*.[37] Ridenger claimed that subsequent to being convicted of aggravated assault, he had requested that his lawyer appeal.[38] His lawyer refused, and the time for appeal passed before he could perfect his appeal.[39] He filed a petition for a writ of habeas corpus requesting an out-of-time appeal, which was granted by the circuit court.[40] The supreme court reversed, reiterating that "[a] habeas corpus proceeding may not perform the function of an appeal unless the original judgment sentence was void."[41]

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[29] Miss. Code Ann. § 11-43-43 (1972); U.C.R.C.C.P. 8.07.

[30] Miss. Code Ann. § 11-43-53 (1972); U.C.R.C.C.P. 8.07.

[31] Miss. Code Ann. § 11-43-1 (1972).

[32] 79 Miss. 358, 30 So. 708 (1901).

[33] *Ex parte Grubbs*, 30 So. at 708.

[34] *Id.* The court noted the validity of the complaint, and that "if objections [to the affidavits] had been seasonably made they would have been quashed." *Id.*

[35] *Id.* The court's refusal to entertain the writ of habeas corpus as a writ of error or as an appeal was grounded in the desire to avoid "throw[ing] the administration of . . . law into inextricable confusion." *Id.*

[36] *Id*; *see also* Ledbetter v. Bishop, 210 So. 2d 880, 883 (Miss. 1968)(habeas petition improper where petitioner convicted upon failure to appear at trial); *Ex parte Adams*, 25 Miss. 883, 889 (1853)(if jurisdiction be admitted, habeas judge cannot decide legality of judgment).

Writs of habeas corpus have been rejected for a host of reasons as being "beyond the scope" of the petition. Falling within this category are cases where the writ was improperly used to request a change in venue,[42] to question the sufficiency of evidence affording conviction,[43] and to seek a pardon on the grounds that imprisonment was injurious to the petitioner's health.[44] The propriety of rejecting a petition for a writ of habeas corpus (in non-custodial cases) as being "beyond the scope" of habeas corpus, or as being an impermissible substitute for appeal, is a function of the limited purpose of the procedure.

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[37] 279 So. 2d 618 (Miss. 1973).

[38] *Ridinger*, 279 So. 2d at 618.

[39] *Id.*

[40] *Id.* at 618-19. In essence, the petitioner alleged that he had been unable to afford a replacement for his recalcitrant attorney, consequently he was ignorant of statutory limitations upon the time for appeal, and as a result he had been denied due process as guaranteed by the fourteenth amendment. *Id.* at 618.

[41] *Id.* at 619 (citations omitted). The remainder of the opinion sheds light on the frequency of appeals postured as writs of habeas corpus. *Id.* at 620-21. The petitioner argued that alternatively the petition was for error coram nobis, entitling him to a new trial. *Id.* at 620. The court noted the possibility of error, but quickly refuted the right of appeal. *Id.* Quoting Butler v. Craig, 27 Miss. 628 (1854), the court stated that "it has long been the settled doctrine of this court, that no equitable exceptions are to be engrafted upon the statutes of limitation, and that where there is not an express exception the court can not create one." *Ridinger*, 279 So. 2d at 620-21 (citation omitted). In sum, this case illustrates that a post-conviction petition for writ of habeas corpus may not be utilized to ameliorate the harsh consequences of the passage of statutory time limits. Note, however, that this harsh stance has been somewhat softened. The supreme court provided, in Jones v. State, 346 So. 2d 376 (Miss. 1977), for the consideration of a *Petition for Appeal* where an individual is convicted of a crime and is precluded from perfecting an appeal within the statutory time solely through the fault of his attorney. *Jones*, 346 So. 2d at 377. *Accord* Barnett v. State, 497 So. 2d 443, 444 (Miss. 1986)(out-of-time appeal granted when attorney causes failure to make timely appeal); Wilson v. State, 426 So. 2d 792, 793 (Miss. 1983)(evidence of attorney misconduct effectively denying petitioner right of appeal creates prima facie case for out-of-time appeal). This line of cases does not appear to expand the scope of a petition for a writ of habeas corpus to encompass out-of-time appeals. *See generally* MISS. CODE ANN. § 99-39-5(h)(Supp. 1987)(statutory provision for out-of-time appeal).

[42] *E.g.*, *Ex parte Smith*, 79 Miss. 373, 30 So. 710 (1901). The petitioner had been charged by a justice of the peace with assault and battery after allegedly beating a man to death. *Id.* at 711. The justice of the peace bound him over to circuit court. Smith then

> There is no principle more fully established in our jurisprudence than this, to wit, [t]he judgment of a court of competent jurisdiction, acting within the scope of its jurisdiction, is binding and conclusive upon all the world, until its judgment has been reversed or set aside by itself or by some superior tribunal having authority for that purpose. Upon an application by habeas corpus to discharge a party. . ., the only question which the judge trying the writ can ask himself is this: *Did the court which made the order of commitment have jurisdiction over the party and over the subject matter?*[45]

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filed a petition for habeas corpus seeking transferral of the case back to justice court. *Id.* The significance of this maneuver is made apparent by comparing the jurisdiction of the two courts; the justice court was limited to trials of misdemeanors, in this case assault and battery, whereas the circuit court could hear felony cases, which subjected the petitioner to the possibility of being tried for murder. *Id.* The supreme court deemed the matter to be beyond the scope of habeas corpus. *Id.*

[43] *E.g.*, Boudreaux v. State, 176 Miss. 840, 170 So. 281 (1936). In this case, the petitioner was convicted of rape. *Id.* at 281. On appeal, certain confessions were suppressed and a new trial granted. *Id.* Boudreaux filed a petition for writ of habeas corpus in circuit court asking that he be discharged because the only evidence against him was comprised of the suppressed confessions. *Id.* The petitioner's plea was refused and the supreme court affirmed, stating, "[t]here is no power in a habeas corpus court to discharge the appellant simply because he conceives that the evidence on a subsequent trial will be insufficient or incompetent." *Id.* at 282 (citations omitted).

[44] *E.g., Ex parte Chain*, 210 Miss. 415, 49 So. 2d 722 (1951). Petitioner Chain was convicted of unlawful possession of liquor, a misdemeanor, and sentenced to serve ninety days in jail, forty-five of which was suspended. *Id.* at 723. The petition for writ of habeas corpus stated that the petitioner had suffered from severe heart disease for the previous ten years, that his health required constant medical supervision, that confinement in jail would likely cause his death, and that "as a matter of humanity in his present state of poor health that he should not be confined in jail." *Id.* The court rejected the petition as being beyond the scope of a writ of habeas corpus, noting that considerations of clemency and pardon remained the exclusive domain of the governor. *Id.* at 725.

[45] *Ex parte Adams*, 25 Miss. 883, 886 (1853)(emphasis added); *accord* Nelson v. Tullos, 323 So. 2d 539, 542 (Miss. 1975)(principal function of writ of habeas corpus in Mississippi is testing legality of petitioner's detention before conviction); Smith v. State, 155 So. 2d 494, 495 (Miss. 1963)(function of habeas corpus writ in Mississippi is inquiring into competency and jurisdiction of tribunal).

Despite the abundance of cases ostensibly limiting the scope of habeas corpus to the review of statutory validity and judicial jurisdiction, historically the lines between permissible and impermissible grounds for habeas relief have been drawn more subtly. Habeas corpus has been recognized as an appropriate remedy where the petitioner was incarcerated for violating an invalid statute.[46]

Further, the writ of habeas corpus has been found to provide a proper remedy where the court has exercised proper jurisdiction but made an order which it did not have the power to make. In *State v. Chambliss*,[47] the defendant was on trial for murder.[48] At the conclusion of the evidence, attorneys for Chambliss and for the State agreed that the jury should find Chambliss guilty and sentence him to life in prison rather than give him the death penalty.[49] Pursuant to the agreement, the case was submitted to the jury without arguments.[50] The only instruction to the jury from the judge was to find Chambliss guilty and sentence him to life imprisonment.[51] The jury found Chambliss not guilty.[52] The judge declared a mistrial and set the case for trial again.[53] Chambliss filed a writ of habeas corpus.[54] The court ruled that a claim of double jeopardy was within the scope of habeas corpus because the trial court had no power to enter any order restraining Chambliss of his liberty once the jury found him not guilty.[55]

The supreme court, addressing its role as an appellate tribunal, justified its power to interrupt a trial in progress in response to a habeas petition alleging double jeopardy in the case of *Harden v. State*[56] by stating:

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[46] Nelson v. Tullos, 323 So. 2d 539, 542 (Miss. 1975).

[47] 142 Miss. 256, 107 So. 200 (1926).

[48] *Chambliss*, 107 So. at 200.

[49] *Id.* at 201.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.* at 205.

[56] 460 So. 2d 1194 (Miss. 1984).

> This Court has no right, and no authority to interfere with trial proceedings except in those rare cases where a trial court is obviously going beyond any semblance of its lawful authority. If there is doubt, we resolve it in favor of non-interference . . . .
>
> If [a petitioner] has presented us with a double jeopardy violation in his habeas corpus petition, however, it is our duty to interfere, and tell the state he cannot be prosecuted. For, such a grave constitutional violation would be one of those exceptional circumstances obligating this Court to abort trial proceedings.[57]

Habeas corpus provides a valuable remedy in civil as well as criminal settings. This is especially true now that habeas corpus is no longer a recognized post-conviction remedy in the state court system.[58]

Habeas corpus is available as a remedy for persons improperly held in institutions for the mentally ill or mentally unsound.[59] Habeas corpus is also available as a remedy for children or incompetents in need of medical treatment where the guardian cannot be found or refuses to give permission for the treatment.[60]

V. Is Habeas Corpus a Civil or a Criminal Action?

Habeas corpus is a *civil* action, *not a criminal* action.[61] Simply stated, proceedings for the punishment of crimes are criminal, and proceedings to enforce civil rights are civil.[62] Habeas corpus is a proceeding to enforce the civil right of personal liberty.[63] The writ is usually brought by a person who is the subject of a criminal prosecution to enforce his right of liberty.[64] Habeas corpus is not brought by the State to prosecute the crime charged.[65] Since the action is civil, the State may appeal the judgment of a habeas corpus court.[66]

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[57] *Id.* at 1200-01 (citations omitted).

[58] *See supra* notes 10-12 and accompanying text.

[59] Miss. Code Ann. §§ 41-19-117 (1972), 41-21-89 (Supp. 1987).

[60] Miss. Code Ann. § 41-41-9 (1972).

[61] State v. Gordon, 105 Miss. 454, 465, 62 So. 431, 431 (1913); *accord* Strickland v. Coopwood, 215 Miss. 485, 487, 61 So. 2d 315, 316 (1952)(proceeding to enforce personal liberty right by writ of habeas corpus is civil); Edmonson v. Ramsey, 122 Miss. 450, 464, 84 So. 455, 457 (1920)(habeas corpus proceedings are civil rather than criminal in nature).

[62] *Gordon*, 62 So. at 432.

[63] *Id.* at 431.

In *Ullom v. Davis*,[67] the accused was ill and could not attend his habeas corpus proceeding.[68] His attorney moved to continue on the basis that section 26 of the Mississippi Constitution guarantees the accused the right to be present and confront the witnesses against him in criminal prosecutions.[69] The court denied the motion, and the accused appealed.[70] The Mississippi Supreme Court held that the right to be present and confront witnesses did not apply because habeas corpus actions "are not criminal prosecutions".[71]

Since habeas corpus is a civil proceeding, the petitioner is entitled to a voluntary nonsuit without prejudice if he so moves before he rests his case.[72] This right may be limited by Rule 41 of the Mississippi Rules of Civil Procedure (hereinafter M.R.C.P.).[73] However, Rule 81(a)(1) of the M.R.C.P. provides that the rules of civil procedure have limited applicability in habeas corpus actions.[74]

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[64] *Id.* at 431-32.

[65] *Id.* The focus of a judicial proceeding under the writ of habeas corpus in a criminal setting "is not. . . the criminal act which is complained of, but. . . the right to liberty notwithstanding the act." *Id.* at 432.

[66] *Id.* The State, though unnamed, is always a real party in interest in habeas proceedings stemming from criminal prosecution. *Id.*

[67] 169 Miss. 208, 150 So. 519 (1933).

[68] Ullom v. Davis, 169 Miss. 208, 216, 150 So. 519, 520 (1933). Ullom had fled California upon being charged with two counts of grand theft. In response to a warrant issued by the Governor of Mississippi, Ullom was arrested and restrained for delivery to an agent of the State of California. Appellant claimed he was unlawfully restrained of his liberty. *Id.* at 519-20.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] Strickland v. Coopwood, 215 Miss. 485, 487, 61 So. 2d 315, 316 (1952). A proceeding to enforce the right of personal liberty by means of a writ of habeas corpus is civil. *Id.* at 316. Thus, it follows that a petitioner is within his rights in requesting a voluntary nonsuit. *Id.*

[73] MISS. R. CIV. P. 41(a)(1) provides for the voluntary dismissal of an action, without requiring the consent of court, provided the notice of dismissal is served prior to the filling of an answer or a motion for summary judgment by an adverse party. MISS. R. CIV. P. 41(a)(1). Rule 41 reflects a significant reduction in the period allowed to a plaintiff for voluntary dismissal. Under § 11-7-125, a plaintiff must request dismissal before the jury retires to arrive at its veridct. MISS. CODE ANN. § 11-7-125 (1972).

VI. Discharge

In habeas corpus actions, the first inquiry the court should make is the legality of detention. An indictment creates a prima facie presumption of legality of detention.[75] The prisoner may produce evidence in an effort to rebut that presumption.[76]

Prior to indictment, there is no presumption of legality of detention.[77] Before the court gets to the issue of bail, it must first be satisfied that probable cause exists to believe a crime was committed *and* probable cause exists to believe the prisoner committed it.[78] If the court is not satisfied on either count, the prisoner should be discharged from custody without bail.[79]

Such a discharge does not bar future prosecution for the same offense.[80] In fact, the habeas court is without authority to bar future prosecution for the same offense.[81] A discharge does, however, bar the State from rearresting the defendant on the same charge and holding him in custody, unless the defendant has been indicted after the habeas corpus hearing, or has been convicted at trial.[82] And, the fact that a person in custody has been given a preliminary hearing will not defeat his right to a habeas corpus hearing.[83]

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[74] "These rules apply to all civil proceedings but are subject to limited applicability in the following actions which are generally governed by statutory procedures: (1) proceedings pertaining to habeas corpus;. . . ." Miss. R. Civ. P. 81(a).

[75] *See* Huff v. Edwards, 241 So. 2d 654, 656 (Miss. 1970)(where record was silent on connection between petitioner and murderer, denial of bail not warranted on theory that proof was evident or presumption great); *accord* Russell v. Crumpton, 208 Miss. 433, 435, 44 So. 2d 527, 529 (1950)(demurrer properly sustained where petitioner failed to charge that proof of guilt was not evident and did not show how proof was deficient).

[76] *Huff*, 241 So. 2d at 656.

[77] *Ex parte Oliver*, 127 Miss. 208, 214-15, 89 So. 915, 916 (1921).

[78] *Id.*

[79] *Id.*

[80] Keller v. Romero, 303 So. 2d 481, 484-85 (Miss. 1974). The county court had discharged the petitioner and enjoined the district attorney from further prosecution. *Id.* at 481. On appeal, the Mississippi Supreme Court held that a county court did not have jurisdiction to enjoin a prosecuting attorney from prosecuting the charged offense. *Id.* at 484-85.

[81] *Id.*

[82] *Id.* at 485.

Although there are cases that hold that the guilt or innocence of the relator is immaterial in habeas actions,[84] it is clear that, as illustrated in *Ex parte Oliver*,[85] evidence of guilt and evidence of innocence is admissible to the extent that it sheds light on the question of probable cause.[86]

The distinction between *Morgan* and *Oliver* and related cases is that the habeas court does not have the authority to *finally* dismiss a criminal charge, or to convict a defendant. It only determines whether or not there is sufficient evidence to warrant a defendant's continued detention.[87] Evidence of guilt is material to show that the defendant should be detained.[88] Evidence of innocence is material to show he should not be detained.[89] A judge could hear evidence from the State sufficient to warrant a defendant's detention, then the court could allow the defendant to put on evidence of innocence. If after having heard all the evidence offered, the judge is *convinced* of the defendant's innocence, he may rule that probable cause does not exist to believe the defendant committed the crime, and he should be discharged, pending indictment or trial.[90] If after having heard all the evidence, the judge has a reasonable doubt of the guilt of the defendant, but is not convinced of his innocence, probable cause may still exist, and the detention would be lawful. This is so, obviously, because the burden of proof on the State is less in a habeas action than in a trial on the merits.

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[83] *Ex parte Tillman*, 111 Miss. 664, 665, 71 So. 910, 911 (1916).

[84] *See* State v. Morgan, 114 Miss. 634, 75 So. 441 (1917). In *Morgan*, the relator was allowed to introduce evidence of his innocence of the alleged charges at his habeas hearing. *Id.* The habeas court granted his discharge. The supreme court overturned his discharge, holding that determination of guilt or evidence of innocence was beyond the scope of the proceeding. *Id.*

[85] 127 Miss. 208, 89 So. 915 (1921).

[86] *Id.* at 916. The relator in *Ex parte Oliver* was arrested and detained on the charge of bank robbery without the benefit of a grand jury indictment. The circuit court dismissed the relator's petition for writ of habeas corpus, maintaining that the Justice Court had jurisdiction over the merits of the case. On appeal, the supreme court reversed and held as follows:

> [The justice of the peace] had no jurisdiction to try the case upon its merits. . . . The habeas corpus court had a right to inquire into the guilt or the innocence of the relator for the purpose of determining whether there was sufficient evidence to warrant his detention, and he had the power to discharge the prisoner if the evidence was insufficient, provided no indictment had been returned by the grand jury.

Id.

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

Matters such as the right to a speedy trial, admissibility of confessions or other evidence, warrantless searches, whether a search warrant was proper, and other evidentiary issues and state and federal constitutional issues, are not material in habeas actions.[91] They are left for determination by the trial court.[92] A person is not entitled to any relief under habeas corpus if he is released on bond.[93] This is so because a habeas court cannot look into the legality of detention if the petitioner is not detained.[94]

VII. BAIL

A. *General Principles*

The most common use of the writ of habeas corpus is the setting or reducing of bail in criminal cases. Mississippi's Constitution provides that "[e]xcessive bail shall not be required, and all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses where the proof is evident or presumption great."[95]

The right to bail before conviction in all cases, except capital cases, is considered a fundamental right safeguarding individual liberty, and is favored by public policy.[96] The right to bail before conviction (in all cases) was first enacted into law in Massachusetts in 1641 and has been a fundamental part of Mississippi law since 1798 when Mississippi was still a territory.[97] The underlying purpose of bail is to insure the accused's appearance at trial.[98] "The justifiable premise for bail is that its denial punishes prior to a guilty verdict while an accused is clothed with the presumption of innocence."[99]

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[91] Keller v. Romero, 303 So. 2d 451, 482 (Miss. 1974).

[92] *Id.*

[93] *Id.* at 483, 485.

[94] *Id.*; *accord* James v. Waldrop, 156 Miss. 322, 126 So. 15 (1930)(persons discharged on bail not considered restrained of their liberty so as to be entitled to writ of habeas corpus).

[95] MISS. CONST. art. III, § 29 (amended 1987).

[96] *Ex parte Dennis*, 334 So. 2d 369, 371 (Miss. 1976). *Accord* Royalty v. State, 235 So. 2d 718, 720 (1970)(amount of bail governed largely by character of offense and financial ability of accused); Resolute Ins. Co. v. State, 233 So. 2d 788, 789 (Miss. 1970)(bail is fundamental, constitutionally protected right). The public interest served by provision for bail is avoidance of "the harsh and expensive necessity of crowding into the jails persons accused of crime and awaiting trial." *Resolute Insurance Co.*, 233 So. 2d at 789.

In *Lee v. Lawson,*[100] the Mississippi Supreme Court stated that "[t]he fixing of bail, whether it be in an amount certain or by recognizance, is left to the sound discretion of the trial judge. His judgment in that regard will not be disturbed unless there is a showing of manifest error or abuse of discretion."[101] In *Lawson*, an indigent was charged with aggravated assault. She was unable to make a $10,000 bond and filed a writ of habeas corpus asking for a release on her own recognizance. Although the bond was reduced to $2,500, she was still unable to make bond and appealed, claiming that a requirement of a cash bond discriminated against indigents and denied them equal protection of the law.[102] The court stated that "a consideration of the equal protection and due process rights of indigent pretrial detainees leads us to the inescapable conclusion that a bail system based on monetary bail alone would be unconstitutional."[103] The court then went on to adopt the American Bar Association's Project on Minimum Standards Relating to Pretrial Release, stating:

> There is incorporated in these standards a presumption that a defendant is entitled to be released on order to appear or on his own recognizance. This presumption, however, does not extend to persons accused of violent and heinous crimes. We want to emphasize that not every person accused of a crime

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[97] Note, *Criminal Law — Bail — Capital Offense Exception to Constitutional Bail Guarantee Unaffected by Abolition of Death Penalty*, 44 MISS. L.J. 565, 565-66 (1973). The concept of bail originated at early common law in England, and was statutorily regulated as early as 1275. However, American colonists significantly expanded the scope of protection afforded by bail as they developed their legal systems. *Id.* at nn. 4-5 and accompanying text.

[98] Royalty v. State, 235 So. 2d 718, 720 (Miss. 1970).

[99] *Ex parte Dennis*, 334 So. 2d at 371.

[100] 375 So. 2d 1019 (Miss. 1979).

[101] *Lawson*, 375 So. 2d at 1021.

[102] *Id.* at 1020.

[103] *Id.* at 1023.

> should be released on his own recognizance or nominal bail. That decision still rests in the sound discretion of the judicial officer . . . . In determining whether there is substantial risk of non-appearance, the judicial officer should take into account the following factors concerning an accused:
>
> (1) The length of his residence in the community;
>
> (2) His employment status and history and his financial condition;
>
> (3) His family ties and relationships;
>
> (4) His reputation, character and mental condition;
>
> (5) His prior criminal record, including any record of prior release on recognizance or on bail;
>
> (6) The identity of responsible members of the community who would vouch for defendant's reliability;
>
> (7) The nature of the offense charged and the apparent probability of conviction and the likely sentence, insofar as these factors are relevant to the risk of non-appearance; and
>
> (8) Any other factors indicating the defendant's ties to the community or bearing on the risk of wilful failure to appear.[104]

The case was subsequently remanded to the habeas court for consideration of the factors set out above.[105]

In commenting on a test substantially the same as the *Lawson* test, the Mississippi Supreme Court in *Ex parte Dennis* noted that "these criteria are not exact and are not intended to be the only standards to be used in considering bail, but they are relevant . . . . to indicate that discretion is still left to judges and that offenders accused of crimes, formerly capital, are not automatically put upon the street to prey upon others."[106]

In *United States v. Salerno*,[107] the United States Supreme Court extended denial of bail to persons indicted for certain serious felonies. The Court held that the government must prove by clear and convincing evidence at an adversarial hearing that no release conditions will reasonably assure the safety of the community or any person.[108] *Salerno* involved a due process and eighth amendment attack on the Federal Bail Reform Act of 1984.[109] Salerno was indicted under the Racketeer Influenced and Corrupt Organizations Act for thirty-five acts of racketeering ranging from fraud to conspiracy to commit murder. At the bail hearing, the prosecution sought to prove that Salerno was a "boss" of a La Cosa Nostra family, and that he would continue his activities if released on bail. The trial judge accepted the State's proof and denied bail.[110]

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[104] *Id.* at 1024.

[105] *Id.*

[106] *Ex parte Dennis*, 334 So. 2d at 374.

[107] 481 U.S. 739 (1987).

In response to the due process argument, the Supreme Court, in a 6-3 opinion, found that the compelling government interest in protecting society from a person shown "to present an identified and articulable threat" outweighed the fundamental right of that person's liberty.[111] In addressing the eighth amendment argument that excessive bail should not be required, the Court held:

> [T]he only arguable substantive limitation of the Bail Clause is that the government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil. Of course, to determine whether the government's response is excessive, we must compare that response against the interest the government seeks to protect by means of that response. Thus, when the government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more. We believe that when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the eighth amendment does not require release on bail.[112]

The Court also stated that "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[113]

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[108] *Salerno*, 481 U.S. at 750.

[109] *Id.* at 739-40. The Federal Bail Reform Act of 1984, 18 U.S.C. §§ 3141-3150 (Supp. III 1982) provided changes in the federal bail process for the purpose of providing "the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released." *Id.* at 742 (quoting S. REP. No. 98-225, 98th Cong., 2d Sess. 3).

[110] *Id.* at 743.

[111] *Id.* at 751.

[112] *Id.* at 754-55 (citation omitted).

Following *Salerno*, Article III, Section 29 of the Mississippi Constitution was amended to read as follows:

> Excessive bail shall not be required, and all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great. In the case of offenses punishable by imprisonment for a maximum of twenty (20) years or more or by life imprisonment, a county or circuit judge may deny bail for such offenses when the proof is evident or the presumption great upon making a determination that the release of the person or persons arrested for such offenses would constitute a special danger to any other person or to the community or that no condition or combination of conditions will reasonably assure the appearance of the person as required.
>
> In any case where bail is denied before conviction the judge shall place in the record his reasons for denying bail. Any person who is charged with an offense punishable by imprisonment for a maximum of twenty (20) years or more or by life imprisonment and who is denied bail prior to conviction shall be entitled to an emergency hearing before a justice of the Mississippi Supreme Court.[114]

Section 29 of the Mississippi Constitution and *Salerno* create a ninth element to be added to the *Lawson* test. The "danger to the community" element will probably be raised by prosecutors in most cases involving violent offenses. The courts with the aid of the bar will have to develop standards for the implementation of this new element. The challenge will be to balance the presumption of innocence and the right of all citizens to their liberty against the reasonable expectation of society to be protected by the state from persons who are proven to be too dangerous to release before trial.[115]

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[113] *Id.* at 755.

[114] Miss. Const. art. III, § 29.

[115] The Supreme Court of Mississippi, in the pre-*Salerno* case of *Ex parte Davis*, 334 So. 2d 369 (1976), was presented the opportunity, at least indirectly, to consider a "public safety" exception. In *Davis*, the relator was indicted of armed robbery, formerly a capital offense, jailed and refused bail. Dennis filed a petition of habeas corpus on the grounds that the Mississippi Constitution forbade denial of bail except in capital cases. *Id.* at 370. The supreme court, upon examination of the state constitution, the statute

B. Time of Filing Writ

A writ of habeas corpus to reduce bond may be filed at any of three times during the pendency of criminal charges: (A) *pre-indictment*, (B) *post-indictment*, or (C) *post-conviction*.[116]

(A) *Pre-Indictment*: Before indictment in non-capital cases, the burden of proof is on the State to show that probable cause exists to believe that a crime was committed and that the defendant committed it.[117] Assuming probable cause is established or admitted, the inquiry turns to the eight-point test set forth in *Lawson*. In capital cases, the burden is on the State to show that the proof is evident or the presumption great. If it succeeds, bail may be denied. If the proof is not evident, or the presumption is not great, but probable cause nonetheless exists, bond should be set or pre-trial release authorized using the *Lawson* eight-point test.[118]

(B) *Post-Indictment*: The indictment creates a prima facie case of legality of detention. The defendant then has the burden

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withdrawing the death penalty from the robbery statute, and other concurrent enactments, concluded that "the legislature did not in any manner, expressly or impliedly, change the meaning of 'capital offense' so as to include within it punishment for armed robbery which does not permit death as a penalty." *Id.* at 372-73.

It should be noted that the majority, in a 5-4 opinion, reiterated that "[t]he prevailing reason for denying bail in capital cases was that pretrial incarceration was necessary for the accused appearance at trial since it was thought that an accused would forfeit his bond by flight rather than risk death by a jury verdict." *Id.* at 371. Additionally, the majority considered the federal factors, similar to those enumerated in *Lawson* for use in consideration of bail, adding that the factors "express the federal notion that the purpose of bail is to reasonably assure the appearance of the accused for trial." *Id.* at 373. At no point does the majority opinion discuss a "public exception" safety to non-discretionary bail.

The minority opinion equated "capital" with "the highest grade of crimes known to our laws," a definition which would encompass armed robbery. *Id.* at 375. The minority felt that denial of bail to individuals indicted of violent or heinous crimes not only insured their presence at trial, but also served the constitutionally acceptable purpose of protecting the general public from dangerous persons. *Id.*

The outcome of a factually similar case presented to the supreme court today, given proper presentation of the issue, different members comprising the court, and the *Salerno* decision, is open to speculation.

[116] *See infra* notes 117-25 and accompanying text.

[117] Huff v. Edwards, 241 So. 2d 654, 656 (Miss. 1970). If a reasonable doubt, or a well-founded doubt, of guilt can be entertained, then proof is not evident nor is presumption great. *Id.*

[118] *Id.*

of going forward with the evidence. After the defendant offers his evidence, "the judge . . . should require the production of all available testimony for the prosecution which justifies the detention."[119] The burden of proof remains on the State. In capital cases, if the proof is evident, no bond is required to be set. In other cases, if probable cause exists, bond is set or pre-trial release is authorized using the *Lawson* test.

A preliminary hearing at which a defendant is bound over to await action by the grand jury does *not* create a prima facie case of valid detention. Both the burden of proof and the burden of going forward with evidence remains on the State.[120]

(C) *Post-Conviction*: Section 99-39-3 of the Mississippi Code abolishes habeas corpus post-conviction collateral relief and provides that such relief can be had under the Uniform Post-Conviction Collateral Relief Act.[121] However, the Act does not specifically address bail after conviction. The Act applies to "[A]ny prisoner in custody under sentence of a court of record of the State of Mississippi who claims: . . . (g) That . . . he is otherwise unlawfully held in custody."[122] A petitioner who has had no bond set, or has had an excessive bond set after conviction could claim he was "unlawfully held in custody," and file a request for relief under the Act.

The Act does not apply to convictions from non-record courts, so a petitioner must rely on habeas corpus to challenge an excessive bail on an appeal from justice court. In addition, a petitioner might argue that a post-conviction habeas corpus request for bail is not a request for relief from a judgment of conviction and is therefore not barred by the Uniform Post-Conviction Collateral Relief Act.

In any event, whichever avenue is taken to achieve a reasonable bail, the case of *Bumphis v. State*[123] sets forth most of the test to be applied. "[W]here bail after conviction is a matter of right, the criteria for fixing bail are the same as the eight enumerated in *Lee v. Lawson*. . . plus consideration of the sentence imposed and any relevant evidence adduced at trial which has a bearing on the issue."[124]

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[119] *Id.*

[120] *Id.*

[121] MISS. CODE ANN. § 99-39-3 (Supp. 1987).

[122] MISS. CODE ANN. § 99-39-5 (Supp. 1987).

[123] 405 So. 2d 116 (Miss. 1981).

Section 99-35-115 of the Mississippi Code defines when bail after conviction is a matter of right, and when it is not, as follows:

> (1) *A person convicted of treason, murder, rape, arson, burglary or robbery shall not be entitled to be released* from imprisonment *pending an appeal* to the Supreme Court, unless it be so ordered by the court in which conviction is had, or by the Supreme Court, or by the judge who presided at the conviction, or the judge of the district in which conviction was had, or a judge of the Supreme Court in vacation of said court; and the making of such order shall be a matter of discretion with either the court or judge to be exercised with the greatest caution, and only when the peculiar circumstances of the case render it proper.
> (2) *A person convicted of any felony other than those enumerated in subsection (1) of this section shall be entitled to be released from imprisonment on bail pending an appeal* to the Supreme Court, *except* that *the trial judge may deny bail to such person pending his appeal upon making a determination that the release of such person would constitute a special danger to any other person or to the community or that no condition or combination of conditions will reasonably assure the appearance of the person as required.* In the event a trial judge denies bail to such convicted person, the judge shall place his reasons for such denial of record in the case. Upon a denial of bail pursuant to this subsection, such person shall have the right to apply to a justice of the Supreme Court for an emergency hearing.[125]

C. Bail In Capital Cases

Death penalty cases where the proof is evident or the presumption great are the exceptions to the rule that persons have a right to pre-conviction bail.[126] The general definition in Mississippi of capital cases includes crimes with a maximum penalty of life in prison, i.e., rape, armed robbery, and murder. However, for purposes of bail, a capital case is one involving a potential death penalty.[127] The reason expressed for the denial of bail in death penalty cases "was simply that a guilty person would rather forfeit his bond than his life."[128]

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[124] *Bumphis*, 405 So. 2d at 118.

[125] MISS. CODE ANN. § 99-35-115 (1972)(amended 1987)(emphasis added). Section 99-35-115 was amended in 1987 to allow a judge the discretion to deny post-conviction bail where he finds that the defendant would constitute a danger to the community or to any person. *Id.*

If there is reasonable doubt of guilt, then it generally cannot be said that the proof is evident or the presumption great. However, it is not necessary to exclude every reasonable hypothesis of innocence to find that the proof is evident.[129] "Where there is only a probability of guilt . . . bail should be granted."[130]

A habeas corpus judge's determination on whether or not the proof is evident or the presumption great will not be reversed unless he has made manifest error.[131] Even where the proof is evident or the presumption great there can be extraordinary or exceptional circumstances in which bail may be admitted in the sound discretion of the trial judge. These include "serious and probably fatal injury to health, or unusual and protracted delay upon the part of the State in bringing a prisoner to trial."[132] Also, where a jury has twice been unable to reach a verdict in a capital case, the defendant is entitled to bail.[133]

VIII. THE USE OF HABEAS CORPUS IN EXTRADITION ACTIONS

There are three prerequisites for extradition. "There must be a showing that the person sought is (1) the person named in the extradition writ, (2) charged pursuant to 18 U.S.C.A. Section 3182 (1969) with a crime in the demanding state, and (3) a fugitive from the justice of the demanding state."[134]

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[126] MISS. CONST. art. III, § 29.

[127] *Ex parte Dennis*, 334 So. 2d at 369.

[128] Blackwell v. Sessums, 284 So. 2d 38, 41 (Miss. 1973)(Rodgers, J., dissenting).

[129] *Huff*, 241 So. 2d at 654.

[130] *Id.* at 656.

[131] *Blackwell*, 284 So. 2d at 39.

[132] *Huff*, 241 So. 2d at 656. *See also Blackwell*, 284 So. 2d at 39 (heart condition in elderly man is factor that may be considered in passing upon bail).

[133] MISS. CODE ANN. § 99-55-35 (1972).

The governor of the asylum state must be convinced that these prerequisites exist before he can deliver a person in his state to the authorities of another. The governor's conclusion that the prerequisites have been met is subject to judicial review by way of habeas corpus.[135]

> [E]xtradition papers, unless fatally defective, make out a prima facie case for extraditing the fugitive.
>
> [A]ll doubts are resolved in favor of the legality of the order of the Governor of the asylum state for delivery of the fugitive to the agent of the demanding state.
>
> Mere irregularities in the extradition papers, or reversible errors existing before conviction, cannot prevent extradition, but otherwise where the verdict and judgment are void on their face and nullities.[136]

The guilt or innocence of the accused is not material in an extradition proceeding. That is a matter for the trier of fact in the demanding state. At a habeas corpus proceeding, the accused could not attempt to avoid extradition by showing that he "committed the homicide in self defense . . . , or that he was insane when the crime was committed, or that the prosecution . . . is barred by some statute of limitations . . ."[137]

IX. EVIDENCE OF ALIBI IN EXTRADITION CASES

Before the *Bishop* case in 1949, Mississippi did not allow evidence of alibi in a habeas corpus proceeding seeking to defeat extradition. The Mississippi Supreme Court had reasoned that evidence of alibi was evidence of guilt or innocence. However, in *Bishop*, the court reasoned that whether or not the accused was a fugitive was a factual determination which must be made by the governor, and the habeas court had the authority to review that decision.[138] The accused alleged that he was not a fugitive from Alabama, because he was in Jackson, Mississippi, at the time the robbery was committed in Birmingham, Alabama.[139] The Mississippi Supreme Court ruled that Bishop was entitled to produce alibi witnesses, not for the purpose of showing innocence, but for the purpose of showing that he was not in Alabama at the time of the commission of the crime and therefore could not be a fugitive from justice.[140]

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[134] Taylor v. Garrison, 329 So. 2d 506, 508 (Miss. 1976).

[135] Bishop v. Jones, 207 Miss. 423, 439, 42 So. 2d 421, 422 (1949).

[136] Tyler v. Pierce, 216 Miss. 498, 500, 61 So. 2d 309, 311 (1952)(citations omitted).

[137] *Bishop*, 42 So. 2d at 423. *See also Ex parte John Devine*, 74 Miss. 715, 715, 22 So. 3, 3 (1897)(guilt or innocence of accused cannot be inquired into on habeas corpus).

[138] *Bishop*, 42 So. 2d at 423.

In *Taylor v. Garrison*,[141] the defendant's ex-wife was found dead in her Missouri home on September 9, 1974.[142] Garrison's bloody fingerprint was found on a fence at the house; a bloody footprint similar to Garrison's was found; and three types of blood were found on the scene: types A, O and B.[143] Mrs. Garrison's blood type was A; Dr. Garrison's was O.[144] An intricate telephone system had been disabled at the house.[145]

Dr. Garrison was subsequently charged with murder, and Missouri sought to extradite him from Mississippi. Governor Waller of Mississippi issued a warrant, and Garrison filed a petition for writ of habeas corpus.[146]

On the issue of whether Garrison was a fugitive, Garrison called numerous alibi witnesses to testify he was in Mississippi at the time of the murder.[147] The habeas court found in Garrison's favor on this issue. The Mississippi Supreme Court reversed stating that since there was a conflict of evidence on whether Garrison was in Missouri at the time of the murder, the proper forum to resolve the conflict was the demanding state, not the asylum state.[148] However, if the defendant "establishes conclusively or beyond a reasonable doubt that he was without the borders of the demanding state at the time of the commission of the crime," then he is not a fugitive, and he will not be extradited.[149]

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[139] *Id.* at 422.

[140] *Id.* at 423. *See also* South Carolina v. Bailey, 289 U.S. 412 (1933)(person arrested in one state seeking discharge by habeas corpus upon ground that he was not in demanding state at alleged time of crime has burden of proving alibi beyond a reasonable doubt).

[141] 329 So. 2d 506 (Miss. 1976).

[142] *Id.* at 508.

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.* at 507.

[147] *Id.* at 508.

[148] *Id.* at 511. The habeas corpus court discovered that Garrison's fingerprint had been substituted, and the court noted that an alibi conflict must be decided by the trial court of the demanding state - not the habeas corpus court. *Id.*

Garrison makes it clear that the burden of proof in a habeas action challenging an extradition is on the accused. If he seeks to prove he is not a fugitive, the degree of proof required is beyond a reasonable doubt. Where all or part of the State's evidence in an extradition proceeding is by affidavit, the burden of proof is on the accused to rebut the affidavits by clear and convincing evidence.[150]

X. HABEAS CORPUS IN CHILD CUSTODY CASES

After cases involving criminal charges, the most common use of the writ of habeas corpus involves custody of children. One of the purposes of habeas corpus is the delivery of the custody of *any* person to the person entitled to custody.[151]

A. *Who Has Right to Custody?*

> [A]ll things being equal . . . the mother of an illegitimate child . . . has the primary right to the child's custody. After the mother . . . the . . . father of the child has a superior right as against all others to the custody of the child. Furthermore, upon acknowledging the child as his own, the father has an equal claim with the mother, to the parental and custodial rights of the child. If neither parent is fit or has abandoned the child, then the court is empowered to grant custody to some other suitable party.[152]

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[149] *Id. See also* South Carolina v. Bailey, 289 U.S. at 412, 420 (1933)(one must have been within state at time of crime to be fugitive from demanding state).

[150] MISS. CODE ANN. § 11-43-39 (1972); *see also* Crumpton v. Owen, 376 So. 2d 641, 643 (Miss. 1979)(fugitive must prove by clear and convincing evidence that he had been without borders of demanding state at time of commission of crime).

[151] MISS. CODE ANN. § 11-43-1 (1972).

[152] Smith v. Watson, 425 So. 2d 1030, 1033 (Miss. 1983)(citations omitted).

B. Jurisdiction

Jurisdiction is proper where the person who has control over the child is located. In *Huffman v. Griffin*,[153] Huffman was the non-custodial parent under an Alabama divorce and custody decree.[154] Huffman took the child from Alabama to his home in Mississippi for visitation purposes.[155] At the expiration of his visitation period, he refused to return the child to the mother, Griffin, who lived in Alabama.[156] On July 6, 1974, Huffman sent the child out of Mississippi to visit relatives.[157] On July 9, 1974, while the child was still out of Mississippi, Griffin filed a writ of habeas corpus against Huffman in the State of Mississippi.[158] It should be noted that Huffman filed a petition for custody of the child in Mississippi on July 1, 1974, while the child was in the state.[159]

Huffman moved to dismiss the writ of the habeas corpus "on the ground that the child was outside the state when the petition was filed, process served, and the case called for hearing, . . . and . . . further that the child was returned to the state only because he was coerced by the court under threat of citation for contempt and therefore the court did not acquire jurisdiction of the child."[160]

The Mississippi Supreme Court held that "a resident defendant who has control of a child, and who has been personally served with process or made a voluntary appearance" may be compelled to produce the child before the court, even if the child is outside the state.[161] In reaching its decision, the court cited numerous opinions from other states, including *In re Jackson*,[162] in which Justice Cooley of the Michigan Supreme Court wrote that the writ of habeas corpus is "directed to, and served upon, not the person confined, but his jailer of the Michigan Supreme Court . . . ."[163]

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[153] 337 So. 2d 715 (Miss. 1976).

[154] *Id.* at 717.

[155] *Id.* at 720.

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] 15 Mich. 417 (1867).

"The place of confinement is, therefore, not important to the relief, if the guilty party is within reach of process . . ." and "can be compelled to release his grasp . . . . The important question is, where is the power of control exercised?"[164]

C. *Priority Jurisdiction*

The *Huffman* court also addressed the issue of priority jurisdiction where two separate suits concerning the same matter are filed in courts of concurrent jurisdiction. In *Huffman*, the father filed suit against the mother in the Chancery Court of Hinds County, Mississippi, seeking custody of the child.[165] Eight days later, the mother filed a writ of habeas corpus against the father in Hinds County Court for custody of the same child.[166] Huffman moved to dismiss the writ claiming that the chancery court had priority jurisdiction. Upon review, the supreme court held:

> [W]here two suits between the same parties over the same controversy are brought in courts of concurrent jurisdiction, the court which first acquires jurisdiction retains jurisdiction over the whole controversy to the exclusion or abatement of the second suit.
> . . . [P]riority of jurisdiction . . . is determined by the date the initial pleading is filed, provided process issues in due course.
>
> In order for [Huffman] to prevail on his motion to dismiss it was necessary that he prove, not only that he had filed a suit in chancery court, but also that process had issued in the suit or, if process had not issued, [he] was not at fault.[167]

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[163] *Id. See also Ex parte Endo*, 323 U.S. 283, 306 (1944)(court may act if the respondent with custody is within reach of process).

[164] 15 Mich. at 440.

[165] *Huffman*, 337 So. 2d at 719.

[166] *Id.*

[167] *Id.* (citations omitted). *See also* Euclid-Mississippi v. Western Casualty and Sur. Co., 249 Miss. 547, 559-60, 163 So. 2d 676, 679 (1964)(circuit court had exclusive jurisdiction of timely filed action in which same suit was filed in chancery court prematurely).

The court ruled that Huffman's "motion must fail because he did not introduce evidence that process was issued and served in due course or that he was not responsible for the failure to issue and serve and process."[168]

D. Venue

Venue is proper in the county where a child is being unlawfully detained.[169] Where the child cannot be found, or if the child is outside the state, venue is proper where the persons who exercise control over the child can be found.[170] It logically follows that venue should be proper where the person who exercises control over the child can be found, without regard to the location of the child.

E. Res Judicata of Habeas Judgment on Future Action

Where a writ of habeas corpus is used to determine the rights of parties concerning child custody, the doctrine of res judicata applies to the judgment.[171] The original judgment controls unless it is proven that there has been a material change of circumstances since the judgment was rendered.[172]

F. Effect of Prior Custody Decree on Habeas Action

Generally, a prior custody decree is regarded as final and cannot be attacked by habeas corpus.[173] However, "the prior decree can be attacked for want of jurisdiction, and thereby rendered void."[174]

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[168] *Huffman*, 337 So. 2d at 719.

[169] Neal v. Neal, 238 Miss. 572, 578, 119 So. 2d 273, 275 (1960); *see also* Logan v. Rankin, 230 Miss. 749, 759, 94 So. 2d 330, 331 (1957)(proper venue of wife's habeas corpus proceeding to recover custody of children was county where father had actual possession and custody of children).

[170] *Huffman*, 337 So. 2d at 720-22.

[171] Mitchell v. Powell, 253 Miss. 867, 875, 179 So. 2d 811, 814 (1965).

[172] *Id.*

[173] Smith v. Watson, 425 So. 2d 1030, 1032 (Miss. 1983). However, the habeas corpus court can disregard the prior decree where subsequent conditions show that the party awarded custody is unfit or has abandoned the child. *See also* Mixon v. Bullard, 217 So. 2d 28, 30 (Miss. 1968)(party who was awarded custody will retain custody unless circumstances show party with custody is unfit to exercise such right or has forfeited such right).

A prior custody decree is not binding on a habeas corpus court if there is a showing that since the rendition of the prior decree, there has been a material change of circumstances showing that the party awarded custody is not fit to have custody, or has forfeited the right to custody.[175] In the absence of such a showing, the prior decree is controlling.

A prior decree of custody between a mother and father was held not to be binding on an aunt and grandfather who had actual custody of the child at the time the decree was entered between the mother and father.[176] Since the aunt and grandfather were not parties to the prior decree, they were not limited to showing a change of circumstances since the rendition of the decree.[177] They were allowed to present evidence concerning their right to custody from the time the child began living with them.[178]

G. What Constitutes Sufficient Grounds to Disregard a Prior Decree?

There must be a showing that since the entry of the prior decree, the custodial parent has become altogether unfit to exercise custody over the child, or that the custodial parent has abandoned the child.[179] Where a custodial parent moves from one state to another because of employment, this does not constitute a change of circumstances which would adversely affect the children, even if it causes a hardship on the other parent.[180]

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[174] *Smith*, 425 So. 2d at 1032.

[175] Wade v. Lee, 471 So. 2d 1213, 1216 (Miss. 1985). *See also Smith*, 425 So. 2d at 1033 (habeas corpus court can disregard prior decree where party awarded custody is unfit or has abandoned custody of the child).

[176] *Smith*, 425 So. 2d at 1033.

[177] *Id.* at 1033-34.

[178] *Id.* at 1034.

[179] *Wade*, 471 So. 2d at 1216.

[180] Pearson v. Pearson, 458 So. 2d 711, 713-14 (Miss. 1984); *see also* Cheek v. Ricker, 431 So. 2d 1139, 1144 (Miss. 1983)(change in residence to obtain suitable employment is not material change in circumstances that would necessitate a modification of the custody decree).

H. Powers and Duties of the Habeas Corpus Court in Child Custody Cases

The "polestar" in a child custody case is the interest of the child.[181] "The best interest and welfare of the child is the prime consideration."[182] "Our law accords value to the vested interest of a minor child secondary only to life itself."[183]

It is clear that the primary duty of the court is to protect the best interest of the child. Just how much authority the court has to perform its duty has been the subject of considerable litigation and some modification over the years. The habeas court has the authority to compel, under threat of contempt, a person who has control over a child to produce the child in court, where such person is in the court's jurisdiction, even if the child is out of the court's jurisdiction.[184]

The powers and duration of a habeas corpus court were explained in *Gray v. Gray*.[185]

> [W]hen inquiring into the cause of the detention of a child brought before him on writ of habeas corpus . . . a chancellor's powers are those only that can be exercised by the judge of any other court before whom such a writ is returnable . . . and are to either set the child at liberty or award its custody to the party entitled thereto.[186]

This portion of *Gray* is consistent with modern law. However, the following portion of *Gray* appears to have been modified:

> After awarding the custody of a child to the party entitled thereto, the judge in a habeas corpus trial is without power to direct the manner in which such party shall exercise his lawful authority over such child, or to direct that he shall thereafter surrender, though temporarily, the custody thereof to another person. The judge does not merely, because he presided in a habeas corpus trial in which the right to the custody of a per-

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[181] *Mitchell*, 179 So. 2d at 818.

[182] *Neal*, 119 So. 2d at 275.

[183] *Wade*, 471 So. 2d at 1214.

[184] *Huffman*, 337 So. 2d at 720-22.

[185] 121 Miss. 541, 83 So. 726 (1920).

[186] *Gray*, 83 So. at 726.

> son was determined, thereby acquire perpetual jurisdiction over the custody and welfare of such person.[187]

Following *Gray*, the court in *Talley v. Womack*,[188] reversed a habeas corpus court's ruling that modified a prior custody decree and awarded joint custody to the parties. The *Talley* court held:

> [A] habeas corpus court is a special court convened to try a single cause, and when its final judgement is rendered, its functions and powers wholly cease. The court may not by special order prolong its powers and jurisdiction. [A] habeas corpus court cannot continue to exist after judgment for the purpose of supervising custody of persons brought within its jurisdiction.[189]

In *Wade v. Lee*[190], the court reiterated that a habeas corpus court has no authority to permanently modify a prior chancery decree.[191] However, under proper circumstances, a habeas court may temporarily modify a prior chancery child custody decree, and "necessarily must be empowered to make and enter such judgments as are in the best interest of the child," including making provisions for visitation and child support.[192]

In *Wade*, the parties were divorced in Sharkey County, Mississippi.[193] The decree gave Wade custody of the child of the parties.[194] Lee was exercising visitation rights in Hinds County when Wade came to pick up the child.[195] Wade seemed to be intoxicated, and Lee refused to give the child to her.[196] Wade subsequently filed a petition for writ of habeas corpus in Hinds

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[187] *Id.* at 726-27. When the order awarding custody has been executed, the judge's jurisdiction ends unless invoked by the issuance of another writ of habeas corpus. *Id.*

[188] 249 Miss. 773, 163 So. 2d 742 (1964).

[189] *Talley*, 163 So. 2d at 744; *see also* Mitchell v. Powell, 253 Miss. 867, 877, 179 So. 2d 811, 815 (1965)(quoting *Talley* case); Cook v. Conn, 267 So. 2d 296, 299 (Miss. 1972)(quoting *Talley* case).

[190] 471 So. 2d 1213 (Miss. 1985).

[191] *Wade*, 471 So. 2d at 1217.

[192] *Id.*

[193] *Id.* at 1215.

[194] *Id.*

[195] *Id.*

[196] *Id.*

County Court.[197]

After a hearing on the writ, the county court found, among other things, that Wade had become a frequent drug user and was emotionally unstable and that Wade was "an unfit and unsuitable mother for the said child and is an unsuitable influence on said child."[198] The writ was dismissed, and Lee was left with temporary custody of the child pending further action by the Chancery Court of Sharkey County, Mississippi, on any further petition for modification.[199] Further, the court made temporary provisions for child support and visitation.[200] All this is in the power of the habeas court, according to the Mississippi Supreme Court, provided the temporary order is given a time limit after which it expires, unless a petition for modification of the prior decree is filed in the proper chancery court.[201]

The degree of proof required in a habeas corpus court is different than in a modification proceeding in chancery court.

> The showing required before a county judge in a habeas corpus proceeding may alter custody is stronger than in the ordinary chancery modification proceeding. In such a chancery proceeding the non-custodial parent must show (a) a substantial change of circumstances since entry of the decree sought to be modified, (b) adversely affecting the child, and (c) that the best interests of the child require the change of custody . . . In a habeas corpus proceeding the non-custodial parent must go further and affirmatively show that, since entry of the decree prescribing the custody arrangement in force and effect at that time, the custodial parent has abandoned the child or has otherwise become altogether unfit to continue to exercise custody over the child.[202]

It should be noted that the powers of a habeas court derive from the action itself, and not from the court the writ is filed in. The result in *Wade* would have been the same had the action been filed originally in the county, circuit, chancery, or supreme court.

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[197] *Id.*

[198] *Id.*

[199] *Id.* at 1215-16.

[200] *Id.* at 1217.

[201] *Id.* at 1217-18.

[202] *Id.* at 1216; *see also* Smith v. Todd, 464 So. 2d 1155, 1157 (Miss. 1985)(court should change custody only after findings based on substantial evidence that change in circumstances materially affects child's welfare adversely); Tucker v. Tucker, 453 So. 2d 1294, 1297 (Miss. 1984)(even though court finds material change in circumstances, court must ask whether change in custody is in best interest of child).

XI. CONCLUSION

The ancient "freedom writ" gives to the habeas corpus court the duty to inquire into the detention of persons brought before them under color of habeas corpus, and the power to set free those illegally detained, or to return persons to their rightful custodian. In addition, a habeas corpus court has the authority to make rulings and issue orders reasonably calculated to enable it to complete its investigation and facilitate the execution of its judgment. The power thus vested is granted equally to any court of habeas corpus, without regard to the forum the writ was originally filed in, whether that be the county, circuit, chancery or supreme court.

To be sure, there are other actions created by statute or rule that can free a person illegally detained (preliminary hearings, Uniform Post-Conviction Collateral Relief Act, etc.) or award the custody of a child to the person properly entitled thereto (divorce, modification, contempt, adoption, termination of rights of unfit parents, additional child custody and support remedies). However, habeas corpus when used properly cuts through form to reach the heart of the issue quickly: liberty or rightful custody. Habeas corpus remains today, as it has for almost 800 years, the "highest safeguard of liberty."

APPENDIX

PETITION FOR WRIT OF HABEAS CORPUS

Comes now the Petitioner, ____________, and files this his Petition for Writ of Habeas Corpus, and in support thereof would show unto the Court the following:

1. Petitioner is incarcerated by Respondent in the ________ __________ Jail in ______________________________ County, Mississippi; Respondent is the Chief of Police of ______________, Mississippi, and may be served with process at his office in the headquarters of the ________________ Police Department.

2. Petitioner was arrested and charged with the crime of __ ___________________________, and has been held in the ___________ _______ Jail without bond since ____________________________.

3. Petitioner believes that he is being held without probable cause, and that he should be discharged from custody.

4. In the alternative, Petitioner is being deprived of his right to reasonable bail guaranteed by the United States and Mississippi Constitutions. Petitioner requests that he be released on his own recognizance or that reasonable bond be set.

> Note: By separate paragraphs, the Petitioner may allege other facts or request other relief, as necessary, such as : Petitioner is indigent and needs counsel appointed to assist him in the habeas action; or there has been a prior preliminary, or other hearing at which a record was taken, and the transcript of the record would be helpful to Petitioner or the Court, etc.

WHEREFORE, Petitioner prays that this Honorable Court grant a Writ of Habeas Corpus ordering the Respondent to produce the body of __________________ before the Court at the first practicable moment, and requiring Respondent to answer this Petition; and that after a hearing, Petitioner prays that this Court will discharge him, release him on his own recognizance or grant reasonable bail. (Specify any other relief as necessary).

Respectfully submitted,

____
Petitioner

STATE OF MISSISSIPPI

COUNTY OF ____________

PERSONALLY came and appeared before me, the undersigned authority in and for the jurisdiction aforesaid, the within named _________________, who after being first duly sworn, stated on his oath that the matters and things set forth in the foregoing Petition are true and correct to the best of his knowledge, information and belief.

____
Petitioner

SWORN TO AND SUBSCRIBED before me, this, the _____ day of ________________, 19__.

____
Notary Public

My Commission Expires:

____

NOTICE OF THE HEARING MUST BE GIVEN TO THE PROSECUTING ATTORNEY IN HABEAS CORPUS ACTIONS INVOLVING CRIMINAL CHARGES. THIS CAN BE ACCOMPLISHED BY DELIVERING A COPY OF THE EXECUTED WRIT AND THE PETITION TO THE PROSECUTOR.

IN CHILD CUSTODY CASES, THE FOLLOWING FORM MAY BE USED:

PETITIONER FOR WRIT OF HABEAS CORPUS

Comes now the Petitioner, ______________________, and files this Petition for Writ of Habeas Corpus, and in support thereof would show unto the Court the following:

1. Petitioner resides at ___________________________ and is the mother of the minor child ___________________. Respondent is the father of said child and may be served with process at ________________________________ ________.

2. Petitioner and Respondent were formerly married, and were divorced on or about ____________________ _____in the ______________ Court of ______________ ________________________. A copy of the divorce decree is attached hereto and made a part hereof.

3. Pursuant to said divorce decree, Petitioner was awarded custody of _______________, the minor child of the parties. Respondent was granted periodic visitation.

4. On or about _______________, _____, Respondent picked up the child for visitation purposes. The period for visitation expired on or about ___________________, __, and Respondent failed to return the child to Petitioner.

5. Respondent continues to maintain custody of the child, and refuses to return custody to Petitioner.

WHEREFORE, premises considered, Petitioner requests that a Writ of Habeas Corpus be issued requiring Respondent to produce ______ ____________ immediately, or at the first judicious moment, to show cause why he detains the said ___________________. Petitioner further prays that after a hearing, she be awarded custody of _________________, and that all costs of this action be assessed to Respondent.

Petitioner prays for general relief.

Respectfully submitted this the _____day of _____________, 19____.

____

OATH

Same as on previous petition.

ORDER FOR ISSUANCE OF WRIT OF HABEAS CORPUS

THIS CAUSE came on to be heard upon the sworn Petition for Writ of Habeas Corpus of ______________, Petitioner, and the Court having considered the sworn allegations of said Petition and being otherwise fully advised in the premises is of the opinion that the Petition is well taken and that a Writ of Habeas Corpus should issue to the Respondent herein.

IT IS, THEREFORE, ORDERED AND ADJUDGED that a Writ of Habeas Corpus by issued by the Clerk of this Court directed to _________ ______________________, commanding and directing him to produce the body and person of Petitioner,________________, to be and appear before this Court on the _______ day of _______________, 19____, at _____o'clock ___M. in the ______________ County Courthouse, at ________________, Mississippi and to then and there show cause if any he can why Petitioner should be further deprived of his liberty.

SO ORDERED AND ADJUDGED on this, the _____day of __________, 19___.

____

COUNTY COURT JUDGE

NOTE; This Order is unnecessary if the Judge issues the Writ. The Judge could logically issue the Writ in every habeas action, simplifying the procedure and making less paperwork for everyone.

WRIT OF HABEAS CORPUS

THE STATE OF MISSISSIPPI,
TO ____________, CHIEF OF POLICE
CITY OF ____________, MISSISSIPPI
(include address, if any)

We command you to have the body of ________________, who is allegedly detained by you, before Judge __________________, at the _____________ County Courthouse, ________________, Mississippi (Courtroom #_______) on the ________ day of _________ ________, 19__, at _________ o'clock ___M. to do any receive what may be then and there considered concerning him.

Witness my hand on this, the ________ day of ______________, 19___.

____
(CIRCUIT) CLERK (OR JUDGE)

Source: Miss. Code Ann. § 11-43-17 (1972).

NOTE: In proper cases, the Writ can direct the Respondent to take the person before the Judge immediately.

IN CASES WHERE THERE ARE REASONABLE GROUNDS TO BELIEVE THAT THE PERSON TO BE PRODUCED MAY BE CONCEALED OR REMOVED FROM THE JURISDICTION, THE FOLLOWING WRIT MAY BE USED:

WRIT OF HABEAS CORPUS

STATE OF MISSISSIPPI

To the Sheriff or any lawful officer of __________ County:

We command you to take and have the body of ____________, who is allegedly restrained of his liberty by ____________________ ______, before ____________________, a Judge of our (County) Court, at the __________ County Courthouse, ____________, Mississippi (Courtroom #_____), IMMEDIATELY, to do and receive what shall then be considered; and you are to summon ____________ _____________ to appear, IMMEDIATELY, to show the cause of detaining ____________________; and you are to return then and there with this Writ with your proceedings endorsed thereon.

WITNESS MY HAND on this, the _____ day of _________________, 19__.

____
(CIRCUIT) CLERK (OR JUDGE)

The person to take:	The person to summon:
_______________________	_______________________
may be found at: (address or location)	may be found at: (address or location)

Source: Miss. Code Ann. § 11-43-19 (1972).

ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW the Respondent, _______________, Chief of Police of the City of ___________________, Mississippi, by and through counsel, and in support of his Answer to the Petition for Writ of Habeas Corpus in the above-styled cause would show unto the Court the following:

1. Respondent admits the allegations of Paragraph I. of the Petition.

2. Respondent admits the allegations of Paragraph II. of the Petition.

3. Respondent denies the allegations of Paragraph III. and IV. of the Petition.

AFFIRMATIVE ANSWER

4. Respondent would show that Petitioner is held by virtue of a warrant signed by Judge _________, a Judge of the Justice Court of the _________________ County, Mississippi. A copy of the warrant is attached hereto and made a part hereof and is marked "Exhibit One".

5. Probable cause supporting the detention includes a confession by the Petitioner, recovery from him of stolen merchandise, eye-witnesses identifying him as the person breaking and entering the house in question, and other evidence developed by investigation.

6. No bond should be set for Petitioner, or alternatively, a high bond should be set for Petitioner because Petitioner has an extensive police record, including seven (7) prior felony

convictions, has twice escaped from jail, has had bonds forfeited in the past, and has never voluntarily appeared at a Court hearing on time.

WHEREFORE, PREMISES CONSIDERED, Respondent requests that the Petition be dismissed, and that Petitioner be held in custody pending final disposition of his case.

Respectfully submitted,

__________, Chief of Police
______________, Mississippi

____

OATH (same as on Petition)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has delivered a true and correct copy of the foregoing Answer to (the Petitioner, or Petitioner's attorney) at (address) by (hand or mail).

This, the _____ day of ______________, 19___.

____
RESPONDENT

Source: UCRCP 8.07

HOLMES, L.Q.C. LAMAR, AND NATURAL LAW

*Michael H. Hoffheimer**

I. Natural Law

Natural law is the theory that there is a super or transcendental law. Roscoe Pound defined natural law historically as the "juristic idealization of the social order of the time and place."[1] Legal theorists have used natural law doctrine to attempt to evaluate whether particular laws are good or bad by comparing them to the higher law. In general natural law insists on a strong connection between morality and law; natural law tends to be closely associated with the philosophy of idealism — the philosophical position that ideas or general categories are primary and particular things are secondary in importance.

For most of the past one hundred years natural law has been unfashionable. Some legal philosophers say that it has been discredited, and some have even argued that it has disappeared.[2]

Holmes contributed much to the decline of natural law. He expressed his criticism sharply and often in intentionally provocative ways. In an article entitled "Natural Law" he wrote: "I used to say, when I was young, that truth was the majority vote of that nation that could lick all others."[3] In contrast, Holmes defined the law in functional terms. He repeatedly defined law as the prediction of the incidence of the exercise of force by society through the instrumentality of the courts.[4] Holmes has been labeled a utilitarian, a legal positivist, and even a legal realist.[5] These labels share the view that Holmes thoroughly repudiated natural law.

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[1] R. Pound, Interpretations of Legal History 5 (1923)(1986 reprint). My work on Holmes and natural law was stimulated in part by Pound's neglected observation that nineteenth-century education was less influenced by English political writers than by natural law juristic writers and continental writers permeated with Hegelian views. *See* R. Pound, *The Revival of Natural Law*, 17 Notre Dame L. Rev., 287, 333 (1942).

[2] *E.g.*, P. Soper, A Theory of Law 51-52 (1984). There has, however, been a revival of interest in natural law. *E.g.* L. Weinreb, Natural Law & Justice (1987).

[3] O.W. Holmes, *Natural Law*, in Collected Legal Papers 310 (1920), *originally published in* 32 Harv. L. Rev. 40-44 (1918).

Holmes's attitude towards natural law is not a totally esoteric issue. His theory of law affected judicial decision-making in important cases. And through the influence of his jurisprudential theory, Holmes continued to exert tremendous influence on the development of the law long after his death. Let me illustrate with two examples. The first is of historical interest to us because of its connection to the law school: it illustrates the importance of natural law in a routine kind of case. The second example is familiar: it illustrates the consequences of attitudes towards natural law in a critical case that continues to affect most of our daily legal practice.

A. Holmes and Lamar

The first case involves one of our distinguished former faculty members, Justice L.Q.C. Lamar. As far as I know Holmes and Lamar never met. But their careers brought them into legal contact on one occasion.

Holmes was sixteen years younger than Lamar. (He was born in 1841; Lamar was born in 1825.) Holmes was sitting on the Supreme Judicial Court of Massachusetts from 1882 to 1902, when Lamar was on the Supreme Court (1887 to 1892). In 1891, after nine years on the Massachusetts bench, for the first time an appeal was taken to the Supreme Court from one of the opinions that Holmes had written. Justice Lamar had the historic honor of reversing Justice Holmes.

Holmes's reaction to being reversed was happily recorded in a letter that he wrote to his friend Pollock in England: "I think it [is] an interesting case and one which I could have written the other way, but I confess [that] I think the ground adopted by the U.S. Court one which is quite *irreconcilable with primary juridical notions.*"[6]

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[4] *See* American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909)(opinion by Holmes, J.)(describing law as a "statement of the circumstances in which the public force will be brought to bear upon men through the courts").

[5] *See, e.g.*, H. POHLMAN, JUSTICE OLIVER WENDELL HOLMES & UTILITARIAN JURISPRUDENCE 9 (1984)(describing Holmes as utilitarian); L. FULLER, THE LAW IN QUEST OF ITSELF 62, 106-07 (1940)(describing Holmes as realist and positivist); Howe, *The Positivism of Mr. Justice Holmes*, 64 HARV. L. REV. 529 (1923)(describing Holmes as positivist).

Let me recite the facts of the case, *Williams v. Heard.*[7] The case, decided in 1891, had originated nearly thirty years earlier during the Civil War. During the war the plaintiffs had operated a shipping firm and had purchased war risk insurance. They suffered losses during the war. In 1875, the plaintiffs had made assignments in bankruptcy to the predecessor of the defendant-assignee. After the war the United States and Britain entered into a treaty settling American claims for losses that had been caused by Confederate war ships that had sailed out of British harbors. Great Britain made a payment and Congress through a series of statutes allocated the funds. By 1882, claims for direct injury had been paid out and funds remained, so Congress enacted further legislation providing for the payment of those claims covered by war risk insurance. The legislation came after the assignment in bankruptcy, and Congress could have done anything with the money, including absorbing it into the general treasury revenue.

In 1886, a Court of Commissioners awarded the defendant-assignee funds representing compensation for losses that had been covered by the war risk insurance. The plaintiffs then brought an action in Massachusetts state court for the money. The issue was who had the right to the award, which represented compensation for the insured losses. Holmes found for the plaintiffs.

The legal problem was whether the assignment of the plaintiffs' interests could pass rights or expectations that arose only after the assignment.[8] The issue could have been decided in various ways: the act of 1882 could have been construed to give the assignee the claim; perhaps even doctrines of equitable estoppel or waiver could have defeated the plaintiffs' action. But Justice

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[6] 1 Holmes-Pollock Letters 39-40 (Howe ed. 1942)(emphasis added).

[7] 140 U.S. 529 (1891).

[8] *Williams*, 140 U.S. at 535-36.

Lamar (after dismissing procedural arguments) justified his opinion on substantive grounds. He recognized that Congress could have done anything with the money and that neither plaintiffs nor their assignees could have asserted claims against either the United States government or Great Britain. But Justice Lamar rejected the argument that it thus followed that payments under the 1882 legislation were purely gratuitous. He wrote: "While. . . there were no means of compelling Congress to distribute the fund. . ., and while the claimant was remediless. . ., nevertheless there was at all times a moral obligation on the part of the government to do justice to those who had suffered in property."[9] Because this general right existed — reflected not in a remedy or a legal duty on the part of the government but in a moral obligation — it was something preexisting which could pass as property or a sort of expectation to the assignee in bankruptcy.

Lamar's reasoning exemplifies the older natural law approach to legal theory. By 1891, Holmes had been attacking natural law theory for years, and there is little doubt that it was precisely the grounds of Lamar's holding which so irritated him — which he found to be *irreconcilable with primary juridical notions.*

B. Erie doctrine

The second case that I want to discuss to illustrate the legal consequences of attitudes towards natural law theory is one with which we are all familiar — *Erie Railroad Co. v. Tompkins.*[10] One funny thing about the rise of the Erie doctrine is that it was proposed, championed, and brought to legal fruition by federal judges who were motivated largely by abstract theories of law and the federal-state relationship. I may be wrong, but I know of no major calls for federal deference to the states' common law from the states in the 1920s and 1930s. It is even possible — perish the thought — that states benefited from forum shopping. Rather the doctrine was justified on theoretical grounds, and support was found in the history of the original Judiciary Act.

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[9] *Id.* at 540-41.

[10] 304 U.S. 64 (1937).

The Erie doctrine is related closely to Holmes's rejection of natural law (in the guise of "general" common law) and his view that law is nothing other than what courts actually do. Formulations of the Erie doctrine are found in Holmes's prior dissents, and *Erie* itself relied on his dissenting arguments as authority precisely on the nonexistence of a "transcendental body of law outside of any particular State."[11]

Erie is also symbolic. The case overruled the holding of *Swift v. Tyson*[12] — which Holmes had characterized as resting on a "fallacy and illusion." The "fallacy and illusion" were the reasoning of Joseph Story who had been one of the strong proponents of natural law jurisprudence in the 1800s. It is interesting to observe that in reversing Holmes, Justice Lamar had relied on Story as one of his chief authorities.[13]

II. THE HOLMES PROBLEM

Having illustrated what natural law might look like and Holmes's rejection of it, let me suggest that there is a problem with the traditional characterization of Holmes as a positivist and a thoroughgoing critic of natural law. I am not the first to suggest this. Many scholars have studied Holmes's theoretical writings and his judicial opinions, and quite a few have concluded that there are important contradictions or tensions within Holmes's theory.[14] Moreover, scholars have noted tensions or contradictions in his opinions. For example, Holmes is famous for dissenting opinions in which he deferred to the authority of legislatures and rejected substantive due process limits on social welfare legislation. At the same time, he is famous for opinions protecting the civil liberties of individuals notwithstanding attempts by the government to curtail them — the "clear and present danger" test. Recent writers have even found inconsistency within his opinions deferring to state authority,[15] and within his opinions treating first amendment rights.[16]

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[11] *Erie*, 304 U.S. at 78 (1937)(*quoting* Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928)(Holmes, J., dissenting)).

[12] 41 U.S. (16 Pet.) 1 (1842).

[13] "It is not universally, though it may ordinarily be one test of right, that it may be enforced in a court of justice . . . . Neither . . . Great Britain nor the government of the United States is suable in the ordinary courts of justice, for debts due by either; yet who will doubt that such debts are rights?" Comegys v. Vasse, 26 U.S. (1 Pet. 193, 216) 108, 118 (Story, J.)(quoted in Williams v. Heard, 140 U.S. at 555.) I have omitted part of the text quoted by Lamar (ellipses added) and emended the punctuation slightly to correspond with the original.

[14] *E.g.*, L. FULLER, *supra* note 5, at 107; Boorstin, *The Elusiveness of Mr. Justice Holmes*, 14 The New England Q. 478, 485 (1941); D. BURTON, OLIVER WENDELL HOLMES, JR. 89 (1980); White, *The Rise and Fall of Justice Holmes*, 39 U. CHI. L. REV. 51, 53

There are important tensions within Holmes' more theoretical writings regarding the nature of law itself. In his famous essay, "The Path of the Law" he treated the law as the prediction of future judicial decisions and reduced the lawyer's task to accurate prediction. But in his book, *The Common Law*, he demonstrated that the law evolved from internal organic rules that led to the law's becoming increasingly objective and aware of its own mission. In that work the lawyer's task as part of the historical process was to participate actively in freeing the law from archaic doctrines that prevented the law from consciously fulfilling its role of promoting social policy. These were not just two different meanings of the word "law." For when Holmes wrote that Lamar's opinion was "irreconcilable with primary juridical principles" — and when he referred to Justice Story's "fallacy and illusion" — he meant something other than that their legal theories militated against accurate prediction.

In order to understand Holmes, I suggest the need to focus on understanding the tensions within his thought. Though scholars have previously observed the tensions, most interpreters of Holmes have generally dismissed the tensions as merely reflecting his inconsistency. I think one reason for the neglect of the

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(1971).

[15] *See* Roberts, *Mining with Mr. Justice Holmes*, 39 VAND. L. REV. 287, 292 (1986)(suggesting possible inconsistency in Holmes's rejection of substantive due process limitations in takings cases but dismissing the suggestion as improbable).

[16] *See* Hunter, *Problems in Search of Principles: The First Amendment in the Supreme Court from 1791-1930*, 35 EMORY L.J. 59, 107 (1986)(illustrating inconsistency of Holmes's treatment of first amendment cases); Robban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1303-27 (1983)(discussing Holmes's impact on development of modern first amendment analysis).

central tensions in Holmes is that most writers have simply taken Holmes at his word when he has attacked transcendental theories of natural law. Holmes remains considered almost universally as a utilitarian, positivist, pragmatist, or realist in his basic theory, despite the fact that sensitive scholars applying the labels have recognized the inconsistency that results from their application.

But the historical evidence is considerably more complex. Let me give a few examples. Holmes was in his youth and college days a strong proponent of the philosophy of transcendentalism. He was raised in the New England circle of transcendentalists, which included people like Emerson and his own father (an important poet, novelist, and essayist of the day). Holmes was himself strongly attracted to transcendental philosophy at the time, and his views are recorded in surviving college articles on subjects like Plato and contemporary art. His strong personal commitment to the abolitionist cause also reflected a belief in transcendental values and natural rights. Holmes was thus espousing transcendentalism at precisely the time when positivist theories were being widely discussed within his intellectual circles — in the decade before the Civil War.

Holmes's philosophical views underwent important changes sometime between his college days and the late 1860s. The great Holmes scholar and biographer Mark de Wolfe Howe was aware of Holmes's early transcendentalism and provided a biographical explanation for Holmes's transformation. Howe suggested that Holmes changed his views as a result of experiences during the war — especially his contact with "Copperhead" antiwar officers in Holmes's regiment. The story goes that Holmes acquired a skeptical attitude about moral absolutes as a result of the friendships and his war experiences. The story also explains Holmes's supposed militarism as the offshoot of his recognition of military values divorced from the goals of military strife — valor, heroism in the abstract.[17]

While I (like all Holmes students) am deeply indebted to

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[17] M. Howe, Justice Oliver Wendell Holmes: The Shaping Years 1841-1870 137-38 (1957); Howe, *The Positivism of Mr. Justice Holmes*, 64 Harv. L. Rev. 536-37 (1951). My short summary of Howe's theory obviously does not do it justice.

Howe's work, I question his explanation of Holmes's intellectual development. Holmes's disillusionment with the war stemmed from his conviction in 1862 that military victory was impossible.[18] It did not reflect a moral relativism or cynicism. Moreover, by studying the record of Holmes's actual readings during and after the war, I have concluded that Holmes did not clearly reject transcendentalism until some time after the war.[19]

I will not bore you with a detailed account of Holmes's readings and intellectual interests during the critical period in his intellectual formation. But I feel confident that the research has, at the very least, refuted historical claims that Holmes's "only extensive study of theoretical methodology" was the reading of the positivist writings of John Stuart Mill.[20] The research indicates far more complexity in Holmes's studies and suggests that Holmes's rejection of transcendentalism, including natural law, was incomplete and ambivalent. Despite expressions of hostility towards natural law, natural law survived — transfigured — in his later writings. Holmes retained interest throughout his life in the champions of transcendentalism. In 1930, long after he supposedly rejected his early transcendentalism and embraced an extreme form of legal positivism he wrote to Pollock, "The only firebrand of my youth that burns to me as brightly as ever is Emerson. . ."[21]

One cannot ignore this as isolated. Holmes kept a diary throughout his adult life, in which he recorded all his readings. His reading list provides important evidence of his intellectual interests. The list of titles that Holmes read over the decades indicates a continuing interest in transcendental and idealist philosophy. For example, the contemporary philosopher whom he read most was the idealist Santayana. And the work that he reread most often was Spinoza's *Ethics.* In his letters he repeatedly — more than a half dozen times to several different correspondents — expressed his basic sympathy with the writings of Santayana and Spinoza. He said repeatedly that it was the view of the world — the cosmos — of Spinoza with which he agreed. For example he wrote Laski in 1929, "It is his view of the universe that is the thing. He sees it as I see it more nearly than any of the old that I can think of."[22] Between 1867 and 1929 Holmes read Spinoza's *Ethics* at least five times. He also read various other works about Spinoza.[23]

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[18] *See* O. HOLMES, TOUCHED WITH FIRE: CIVIL WAR LETTERS AND DIARY OF OLIVER WENDELL HOLMES, JR. 1861-1864 79 (Howe ed. 1946)(letter of December 20, 1862).

[19] I also question Howe's psychological speculations about the impact of the war experiences. Howe's theory rested heavily on correspondence in which Holmes questioned the war effort. Howe interpreted Holmes's attitude as questioning the union cause, but the surviving letters clearly challenged only the possibility of a union military victory.

[20] Kelly, *Oliver Wendell Holmes, Utilitarian Jurisprudence, and the Positivism of John Stuart Mill*, 30 AM. J. JURIS. 189, 192-93 (1985)(discussing Holmes's study of theoretical methodology). *See also* Kelly, *A Critical Analysis of Holmes's Theory of Torts*, 61 WASH. U.L.Q. 681, 698 (1983)(same). The claim is contradicted by the record of Holmes's reading as well as surviving correspondence. *See* Holmes's letter to William James of December 15, 1867, in THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS, AND JUDICIAL OPINIONS 410-11 (Lerner ed. 1946).

[21] 2 HOLMES-POLLOCK LETTERS 264 (Howe ed. 1942).

Spinoza was a Dutch Jewish philosopher who lived in the 1600s. I will not try to summarize his theories. But let me attempt to convey the flavor of his writing. The *Ethics* is organized like a geometric proof, with definitions, axioms, propositions. The first Part (concerning God) begins with this definition: "By that which is *self-caused,* I mean that of which the essence involves existence, or that of which the nature is only conceivable as existent."[24] In another work Spinoza defined as natural law (natural right): "the very laws or rules of nature, in accordance with which everything takes place, in other words, the power of nature itself."[25] And elsewhere he wrote that "all things follow with inevitable necessity from the nature of God. . ."[26]

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[22] 2 Holmes-Laski Letters at 1133 (Howe ed. 1953).

[23] *See* entries in the so-called Black Book, Oliver Wendell Holmes, Jr., Papers, Harvard Law School Library, at 108 col.2, 109 col. 2, 121 col. 2, and 131 col. 1; Little, *The Early Reading of Justice Oliver Wendell Holmes*, 8 Harvard Library J. 63, 175 (1954).

[24] 2 The Chief Works of Benedict de Spinoza 45 (Elwes trans. 1955).

[25] *A Political Treatise*, in 1 The Chief Works of Benedict de Spinoza 292 (Elwes trans. 1951)(A.H. Gosset translated this work; *see id.* xxxiii.)

[26] Letter to Oldenberg [Dec. 1675], 2 The Chief Works of Benedict de Spinoza 301.

III. RECONSIDERING HOLMES'S POSITIVISM

Curious stuff that Holmes was reading and expressing approval of! And pursuit of his intellectual sympathies takes us far from his legal theory and judicial activity. But this background sheds light on Holmes's legal theory and casts into doubt the almost universal interpretation of Holmes as a functionalist, utilitarian, or positivist theorist. It confirms rather, I think, a maverick interpretation of Holmes that was proposed over fifty years ago by Dr. Wu (then a law student at Michigan, later a Justice of the Supreme Court of China, and still later a teacher in the United States.)[27] Wu was himself an outsider — from China — and his distance may have allowed him to see what few of Holmes's contemporaries appreciated: there were powerful idealist and transcendental elements in his theory of law. As Wu put it later: "it is not easy to say whether Holmes is an idealist or a positivist. He is both, just as the common law is a combination of the actual and the ideal."[28] But Wu's insight suffered the fate that scholars fear most: it was simply ignored.

There are important connections between Holmes's philosophical views and his legal theory which require serious students of Holmes to deal with the problem of his philosophy: First, Holmes himself thought that legal theory offered an entry to deeper philosophical understanding. He said so in two different letters at different points in his life.[29] In a sense, he believed that all specialized study may lead to broader philosophical truth. In a speech in 1897 he said that "one part of the universe yields the same teaching as any other if only it is mastered. . ."[30] But Holmes also ascribed a special power to the study of law which derived from law's unique status as immediately both practical and theoretical. Holmes saw himself as a philosopher, even in his legal work, not just a technician or a predictor. True, he referred to law as science; but so, too, did

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[27] *See* Wu, *The Juristic Philosophy of Justice Holmes*, 21 MICH. L. REV. 523 (1923).

[28] Wu, *Justice Holmes and the Common Law Tradition*, 14 VAND. L. REV. 221, 226 (1960).

[29] Letter to Emerson (1876), in M. HOWE, *O.W. Holmes, Jr.: Counselor-at-Law* 8 (1948); Letter to Pollock (1881), 1 HOLMES-POLLOCK LETTERS at 16.

[30] Speech at Brown Commencement, in O.W. HOLMES, COLLECTED LEGAL PAPERS 166 (1920).

Joseph Story.[31]

Second, Holmes's most important theoretical work, *The Common Law*, manifested the influence of transcendental philosophical attitudes in its general goal and in its organization and treatment of particular legal topics. The goal of the work was raising the awareness of the process of legal development to self-consciousness. This appears positivistic only in the trivial sense that Holmes recognized that a developmental factor was the unarticulated policies behind legal rules. In its purpose, raising of consciousness to self-awareness, the book incorporated one of the chief principles of the transcendentalists. And Holmes also manifested his debt to the transcendentalists by identifying the process of self-awareness not just with enhanced functional effectiveness of legal prediction but with human freedom.[32]

Holmes's treatment and neglect of specific areas of law within *The Common Law* reflected basic philosophical biases. For example, the work omitted a separate treatment of agency liability. This omission cannot be explained by the assumption that he did not think it was important, nor by the assumption that agency did not illustrate points that he sought to make in the book. In fact Holmes had previously treated agency law at some length; the history of agency provided an important example of the dynamics of legal development that he proposed; and his study of agency law may even have helped stimulate the historical theory Holmes advanced in the book. Rather Holmes did not give agency separate status because agency provided of itself no normative duties and correlative rights; it only transferred such duties and rights by means of the fiction of identity of principal and agent. *The Common Law* was preoccupied with the rational evolution of a unified theory of liability. In a later marginal note which Holmes made to his own copy of the book he wrote, "I propose to show that the true bond of union of all these [early forms of liability] is not to be found in the various grounds of policy wh[ich] have been mentioned but in one wh[ich] is com[mon] to them all."[33] Here, too, Holmes displayed commitment to the search for the generalizing and cohesive aspects of law that were associated with traditional natural law doctrine.

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[31] *See* Speech at the Centennial Celebration of Harvard University (1852), in THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 737 (W. Story ed. 1852)(1972 reprint)("No one appreciates more fully than myself the general importance of the study of the law. No one places a higher value on that science. . ."); *Course of Legal Study* (1817), in *id.* at 66, 69-70, 84.

[32] *See* O.W. HOLMES, *Law in Science and Science in Law*, in COLLECTED LEGAL PAPERS 225 (1920)("History sets us free. . .").

IV. Displacement of Natural Law

Rather than rejecting transcendental natural law, Holmes retained it and transformed its role in two crucial ways. First, he rejected the accessibility of natural law to the individual and transformed it into something that manifested itself only to groups — above all to self-aware groups. Second, he rejected the notion of natural law as an absolute and transformed it into something that emerged only over time. Nevertheless, in replacing an absolute concept of law with an evolutionary and historical one, Holmes adopted transcendental standards — standards against which the actual law at any time could be measured. For example, good law was increasingly objective and concrete. Good legal theory produced ever more objective and concrete law by making the grounds of law (social policy) explicit and by making law comport with its grounds. Holmes labored to develop a general theory to explain the apparent diversity of cases and rules.[34]

My interpretation of Holmes's mature theory is consistent with my interpretation of his reaction to the war experience; his skepticism was a rejection of the certainty of individual knowledge, not a cynical rejection of the values of either the individual or group. On the contrary, the outcome of historical development validated the claims of such values.[35]

If we read Holmes historically and do not attempt to minimize his contradictions, we must acknowledge, I think, that Holmes remained deeply contradictory in part because he rejected natural law while retaining some of its chief features. Holmes's ambivalence in turn sheds light on some of the apparent inconsistencies in his legal theory and in his opinions. For example, Holmes embraced an abiding optimism in process and group development. This was not so much inconsistent with his more cynical remarks — which his critics interpreted as meaning "might makes right." Rather the optimism provided the background which made it possible for him to make such remarks: he was confident that the long-term development of the group did in fact promote right. And in this tacit appeal to the future, Holmes also expressed basic attitudes traditionally associated with transcendental natural law theory.

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[33] O.W. Holmes, The Common Law 9 n.d (Howe ed. 1963).

[34] *See* G. White, Tort Law in America: An Intellectual History 13-19 (1985).

[35] My interpretation and biographical work is also consistent, I think, with the interpretation of Holmes's theory of law as a "system" of evolving intelligence in which "[t]he law may hope to be wiser than the individuals who make it." *See* Elliott, *Holmes and Evolution: Legal Process as Artificial Intelligence*, 13 J. Legal Studies 113, 139 (1984).

The ambivalence is also expressed in his opinions. Holmes deferred to the state, but his deference reflected his abiding faith in the ultimate outcome of progressive and democratic process. It is equally wrong — historically — to reduce Holmes to a cynical proponent of state force or to reduce him to a progressive panoptimist. The central tension — rooted deeply in his emotional and biographical development and manifested in his philosophical and jurisprudential attitudes — cannot be eliminated.

V. Implications

Historians rarely reflect on the larger implications of their work. Although it is the larger implications that motivate them, it is considered bad history to do so. Nevertheless, let me break the Code and list a few of the implications of seeing Holmes as I do.

First, Holmes's critics, beginning in the 1940's changed radically their grounds of criticism. In doing so they failed to appreciate the extent to which they were themselves reacting to different historical perceptions and failed to appreciate that Holmes (for example in deferring to state authority) manifested optimism not totalitarianism.[36] A more complex view of Holmes is not only more accurate historically, it provides support for the continuing validity of important insights of his theory.

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[36] Contrast the different attitudes towards militarism expressed by critics of Holmes's rejection of natural law in Zane, *German Legal Philosphy*, 16 Mich. L. Rev. 345-46 (1918), Zane, *A Legal Heresy*, 13 Ill. L. Rev. 255 (1918) and L. Fuller, *supra* note 5, 106-07.

Second, appreciation of the way in which Holmes transformed natural law — claims supported by direct appeal to absolute standards — illuminates a critical period in American cultural and political history: the convergence of ideology that made possible the reunification of national commitments in the generation after the Civil War. Let me illustrate by again comparing Holmes and Lamar. They were complete opposites in almost every way. Both were drawn before the war to opposite positions on the slavery question, and both supported their positions on absolute natural law grounds.[37] After the war both participated actively in the reunification of the country. Professor Meador singles out Lamar's appointment to the Supreme Court as "the last step toward national reconciliation and reunion in the long aftermath of the Civil War."[38]

Despite the continuing differences of Holmes and Lamar on legal matters, the ideology of both underwent an important transformation that resulted in a convergence. Holmes's transformation occurred in private, but Lamar's was public: His eulogy of Sumner in 1874 was one of the great events of the day. Its closing lines electrified the nation: "My countrymen! *Know* one another, and you will *love* one another."[39] Both Holmes and Lamar advanced intellectual arguments that provided for consensus but did not require individuals to agree on important conflicting moral values. Analysis of Lamar's eulogy shows that he "carefully praised Sumner as a man utterly dedicated to individual liberty, but at the same time avoided any indication that the South had been wrong on the [slavery] question."[40] Holmes, too, effected the convergence by adopting rhetorical techniques that sought to win consent and establish community by inviting persons with conflicting values to seek unity in higher transcendental values. Lamar appealed to mutual understanding and love. Holmes's use of the rhetoric of transcendence is more complex, but emerges from a careful reading of his legal writings.[41] Both Holmes and Lamar recognized that transcendental claims could no longer be advanced by the individual without challenge — that indeed such claims could be disruptive of the community. Both placed greater value on abstract values that challenged the moral commitment of neither North nor South. Positive features of the abstract values embedded in Holmes's and Lamar's language of transcendence included tolerance, resignation, and willingness to wait and abide by the outcomes of historical processes that remained unknowable to the individual.

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[37] *See* D. BOORSTIN, HIDDEN HISTORY 159-75 (1987) (discussion of common appeal of conflicting traditions to unwritten law).

[38] D. MEADOR, *Lamar to the Court: Last Step to National Reunion*, SUPREME COURT HISTORICAL SOCIETY YEARBOOK 1986 22, 27 (1986).

[39] *See* E. MAYES, LUCIUS Q.C. LAMAR: HIS LIFE, TIMES, AND SPEECHES 1825-1893 184-87 (1896); W. CATE, LUCIUS Q.C. LAMAR: SECESSION AND REUNION 4 (1935).

[40] J. MURPHY, L.Q.C. LAMAR: PRAGMATIC PATRIOT 116 (1973).

Within the legal community, convergence was effected by increasing reliance on procedural and morally neutral policy arguments. Many of the general trends of law in this century — the expansion of federal jurisdiction (power) simultaneously with a relinquishing of efforts to ground that power in claims of substantive law, the decline of substantive due process, the Erie doctrine, the elaboration of purely procedural standards of review in criminal law and administrative proceedings — witness the continuation of trends that Holmes and Lamar helped initiate. Holmes's attitude to natural law obviously does not explain the past hundred years of legal development. It is only a footnote —a footnote to a footnote — to that development. Yet as Holmes observed in the context of an opinion addressing the impenetrable mysteries of the difference between direct and indirect taxes: "[u]pon this point a page of history is worth a volume of logic."[42]

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[41] Mary L. Dudziak argues that "it was through the power of his literary form that Holmes most clearly expressed the opinions that, in his view, were most appropriately held to himself." Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law*, 71 Iowa L. Rev. 833, 866 (1986). Joan L. Schwartz, carefully analyzing Holmes's "The Path of the Law" shows convincingly that Holmes's three-part organization proceeds from a statement of contradiction to rhetoric of transcendence: "Apparently recognizing that dialectic always espouses contraries, Holmes employs the rhetorical strategy of transcendence so as to rise above the actual contraries within the law and instead moves into the realm of potentiality for law where everyone can agree." Schwartz, *Oliver Wendell Holmes's "The Path of The Law": Conflicting Views of the Legal World*, 29 Am. J. Legal Hist. 235, 249 (1985).

[42] New York Co. v. Eisner, 256 U.S. 345, 349 (1921).

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COMMENTS

FDIC AND FSLIC PURSUIT OF CLAIMS AGAINST OFFICERS, DIRECTORS, AND OTHERS INVOLVED WITH FAILED LENDERS

I. Introduction

A record number of bank and thrift institution failures have occurred within the past few years[1]. Because of the position held as insurer of deposits in most of these institutions, government regulators have been forced to act when the financial security of deposits was threatened.[2] The intervention has generally been through either a purchase and assumption transaction or by liquidation of assets with payment to the insured depositors.[3] The governmental entities charged with this responsibility, primarily the Federal Deposit Insurance Corporation (FDIC), the Federal Home Loan Bank Board (FHLBB), and the Federal Savings and Loan Insurance Corporation (FSLIC) have been faced with monumental potential liability[4] and steady depletion of assets.[5] This comment will examine the actions taken by these regulators to hold individuals personally liable in the wake of this wave of lending institution failures. The focus will be on the nature of the claims urged, the classes of individuals from whom recovery is sought, and special considerations involved when a federal regulator/insurer is the adversary.

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[1] *Bank Failures Climb to 138; FDIC Extends Open-Bank Aid to Two More Institutions*, [Jan.-June] Banking Rep. (BNA) No. 48, at 21 (Jan. 8, 1987). In 1986, 138 banks failed. *Id.* This was the third consecutive year of a record number of failures. *Id.*

[2] The depletion of reserves of the government insurers has resulted in vigorous pursuit of claims. Vartanian & Schley, *Bank Officer and Director Liability — Regulatory Actions*, 39 Bus. Law. 1021, 1022 (1984). In nearly every bank failure, the FDIC plays a part in the liquidation of the institution. Platt & Darby, *A Primer on the Special Rights and Immunities of the Federal Deposit Insurance Corporation*, 11 Okla. City U.L. Rev. 683, 684 (1986).

[3] Platt & Darby, *supra* note 2, at 687.

[4] *Special Report: Attempts to Deal with Banks Affected by Weakened Economy in Oil Producing States Raise Policy Questions*, [July-Dec.] Wash. Fin. Rep. (BNA) No. 47, at 455 (Sept. 22, 1986). The FDIC's list of problem banks now virtually equals the number of FDIC examiners. *Id.*

II. BACKGROUND

Congress recognized the problem facing the nation's banks and savings and loan industry and in 1984 expressed its impatience with the federal regulatory agencies dealing with the problem.[6] Congress urged action to provide more accountability by those responsible for many of these problem institutions.[7] Prompted by Congress, an aggressive campaign has been launched by the FHLBB, FSLIC and FDIC[8] to pursue civil actions against all persons who may have contributed to the losses sustained by the troubled institutions.[9]

The agencies are particularly interested in using civil actions hoping that others engaged in similar activities may be deterred thereby.[10] The civil actions to impose personal liability for the failures of savings institutions are thus designed to serve the dual purposes of recovering any funds possible and encouraging more prudent behavior on the part of others remaining in the industry [11]. The FDIC, although it disclaims doing so,[12] has been active in pursuit of claims against directors and officers of failed banks.[13] Perhaps because of its more tenuous financial position, the FSLIC has been the most aggressive of the agencies, seeking recovery from directors, officers, other employees, accountants, attorneys and appraisers associated with these troubled lenders.[14] The extent of this activity has made these regulatory agencies perhaps the largest client of outside legal services in the nation.[15] At rates of up to $285 per hour for outside attorneys,[16] the agencies seek to limit their losses.

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[5] *Developments in Banking Law 1986*, 6 ANN. REV. OF BANKING L. 1, 28 (1987).

[6] *Federal Response to Criminal Misconduct and Insider Abuse in the Nation's Financial Institutions*, H.R. REP. No. 1137, 98th Cong., 2d Sess. 8 (1984). [hereinafter *Federal Response*].

[7] *Federal Response* at 18. The Congress urged that increased civil enforcement actions be used against individuals, even when the agency has already made criminal referrals or where the individual has already resigned. *Id.*

[8] The FHLBB has succinctly stated its policy in a report to Congress:

> As the Congress and the [FHLBB] have removed legislative and regulatory restrictions on the operations of financial institutions, the obligation to act responsibly and knowledgeably has fallen directly on the directors and managers of those institutions. The [FHLBB] must aggressively pursue those directors and managers who are willing to accept this self discipline.

FHLBB, *Agenda for Reform* 7 (1983).

[9] Generally the regulatory agencies have similar authority to develop and pursue remedies. *See* Vartanian & Schley, *supra* note 2, at 1023-24 (Comptroller of the Currency, Federal Reserve Board, the FDIC, and FSLIC have identical authority to issue cease-and-desist orders). Also, when acting as assignee or subrogee each regulator has identical authority. *Id.* at 1028.

[10] Vartanian & Schley, *supra* note 2, at 1029. The FDIC and FSLIC attempted to obtain maximum publicity in these actions, unlike ordinary civil actions. *Id.* The statement of policy of the FDIC announced that the agency would issue a press release to describe any enforcement action it took against banks or individuals. 50 Fed. Reg. 20,609 (1985).

Typically, as part of any "bail-out" of a troubled lender, the insuring agency will take an assignment of certain assets.[17] Assets assigned commonly include any choses in action that the lender might have against its directors, officers, or any other third party.[18] Thus, the agencies have standing to pursue civil remedies against this wide variety of defendants by virtue of these assignments. In some instances, the regulators are actually appointed receivers of the institutions.[19] As such, they step into the shoes of the institution as subrogee and may pursue any claim the institution might have pursued.[20] Finally, statutes and regulations occasionally provide an independent basis for civil action by an agency.[21]

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[11] Vartanian & Schley, *supra* note 2, at 1030. The Assistant General Counsel of the Federal Home Loan Bank Board stated that the threat of personal liability may prove to be an effective deterrent to the mishandling of thrift institution funds. *FSLIC Sues Failed State Savings' Chairman, Officers For $100 Million*, [Jan.-June] Wash. Fin. Rep. (BNA) No. 46 at 81, 82 (Jan. 13, 1986). Congress urged disclosure of civil actions by the agencies against individuals unless the disclosure would harm the institution itself. *Federal Response* at 18.

[12] *Seidman Recommends Separate Budgets for Outside Bank Directors*, [July-Dec.] Wash. Fin. Rep. (BNA) No. 47, at 709 (Nov. 3, 1986). FDIC Chairman L. William Seidman conceded that the institution had not been overly zealous in bringing actions against failed banks. *Id.*

[13] FDIC spokesmen have admitted that they sue officers and directors every time a bank fails. P. Baker, Remarks at the Eighth Annual Banking Law Institute (March 28, 1985)(materials available from the Texas Association of Bank Counsel and the Texas Tech Law School Foundation).

[14] Vartanian & Schley, *supra* note 2, at 1024. The FSLIC realized that many of these thrifts were mutually owned therefore the managers were not subject to the normal forces of market discipline. They had no stockholders to question profitability and their salaries were generally independent of the profitability of the institution. *Id.* at 1029-30.

[15] Lauter & Middleton, *Bank Failures Spark Millions in Legal Fees*, 7 NAT'L L.J., Feb. 4, 1985, at 53, col. 1.

[16] *Id.* at 53, col. 3.

[17] Gunter v. Hutcheson, 674 F.2d 862, 865 (11th Cir.), *cert. denied*, 459 U.S. 826 (1982). Congress has expressed a preference for purchase and assumption transactions over straight liquidation of the lender. Platt & Darby, *supra* note 2, at 690.

[18] Vartanian & Schley, *supra* note 2, at 690.

[19] For example, Mississippi law requires that the FDIC be appointed receiver of any

III. JURISDICTION

Actions by the regulatory agencies have been filed in both state[22] and federal courts.[23] Interestingly, the courts have divided on some fundamental issues, making the choice of the appropriate forum important. Statutes provide that when the agency is acting other than as receiver of a state chartered lender, actions by the agency may be brought in federal courts.[24] However, the question of proper forum when the agency acts as receiver for a state chartered institution has not been completely settled.[25]

The question of forum may be of significance to the outcome of the litigation. Since the powers of the regulators are defined by federal law, some see a tactical advantage for the agency to bring suit in federal court.[26] Additionally, where there is a conflict of laws question between federal and state law, proponents of state law usually prefer to argue their position in state courts.[27]

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insolvent bank that it insures, provided the agency will accept the appointment. MISS. CODE ANN. § 81-9-73 (1972).

[20] Vartanian & Schley, *supra* note 2, at 1028.

Mississippi provides the receiver corporation with the power to bring suit to enforce any liability of officers or directors of a bank placed in receivership. MISS. CODE ANN. § 81-9-51 (1972).

[21] *See infra* notes 176-211 and accompanying text.

[22] *See* FSLIC v. Huff, 237 Kan. 873, 704 P.2d 372, 375 (1985) (FSLIC suit against officers and employees of state savings and loan).

[23] *See* FDIC v. Dempster, 637 F. Supp. 362, 364 (E.D. Tenn. 1986) (FDIC suit against officers and directors of state bank); FSLIC v. Williams, 599 F. Supp. 1184, 1190 (D. Md. 1984) (FSLIC suit against directors, officers, and employees of state savings and loan); FDIC v. Buttram, 590 F. Supp. 251, 252 (N.D. Ala. 1984) (FDIC suit against directors of state bank); FSLIC v. Bass, 576 F. Supp. 848, 850 (N.D. Ill. 1983) (FSLIC attacked validity of employment agreements with directors of state savings and loan); FDIC v. Abraham, 439 F. Supp. 1150, 1151 (E.D. La. 1977) (FDIC suit against directors of state bank).

[24] 12 U.S.C. § 1819 (Fourth)(1982) confers subject matter jurisdiction on the United States district courts when the FDIC is a party, except when it acts solely as a receiver of a state bank. *Id.*

[25] *See infra* notes 35-53 and accompanying text.

[26] Norcross, *The Bank Insolvency Game: FDIC Superpowers, the* D'Oench *Doctrine, and Federal Common Law*, 103 BANKING L.J. 316, 336 (1986).

[27] *Id.* at 337.

Choice of law may also be important to the outcome of a suit by an agency. For example, the standard of diligence required of a bank director may vary from jurisdiction to jurisdiction.[28] Similarly, courts are not in agreement as to elements necessary to allege a cause of action for breach of fiduciary duty.[29] Several states have rejected the standard set forth under federal common law.[30] Not infrequently, states have statutes prescribing standards of care for bank directors and officers.[31] Some states see these statutory standards of care as preempting common law standards,[32] while other states hold that these statutes simply impose additional duties upon the persons addressed.[33] The Supreme Court has taken the latter view.[34]

Frequently, actions against officers, directors, and others include claims based on simple negligence, breach of fiduciary duties, breach of contract, or waste.[35] If the institution is state chartered, the question of federal subject matter jurisdiction arises.[36] Because of the inconsistent practices of the states[37], believed by some courts to have helped create the crisis among lending institutions,[38] courts have often been willing to find federal jurisdiction based on federal common law.[39] The reasoning has been that the "federal interests in the uniform regulation of the federally chartered savings and loan associations . . . can only properly be protected by a federal rule of decision,"[40] particularly to the question of the fiduciary duty owed by officers and directors to federally insured institutions.[41] Others have rejected the assertion of federal jurisdiction over claims for negligence, breach of fiduciary duty, or breach of contract, finding these to be essentially state claims and insufficient to support federal jurisdiction.[42] Thus these courts will decline jurisdiction, and state law, rather than any purported federal common law, will be applied.

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[28] *See infra* notes 126-33 and accompanying text.

[29] *Compare* King v. Ballard, 643 S.W.2d 457, 464 (Tex. Ct. App. 1982)(director who knew of self dealing by bank president but took no action held not to have breached fiduciary duty), *modified*, 652 S.W.2d 767 (Tex. 1983) *with* Joy v. North, 692 F.2d 880, 896 (2d Cir. 1982)(ignorance of improper activities itself may constitute breach of fiduciary duty), *cert. denied*, 460 U.S. 1051 (1983).

[30] *See infra* notes 139-40 and accompanying text.

[31] *See, e.g.*, GA. CODE ANN. § 7-1-490 (1982)(ordinary prudent men in like position); IDAHO CODE § 26-213 (Supp. 1988)(duty to attend meetings, diligently and perform honestly); IOWA CODE ANN. § 524.604 (West 1970 & Supp. 1988)(duty is one of ordinary prudent person in like position, including periodic review of records, attendance at meetings, periodic review of security measures).

[32] *See* Bailey v. O'Neal, 92 Ark. 327, 122 S.W. 503, 504 (1909)(statute creates duty of directors, changes rule of common law and becomes exclusive test of liability). *But see* Creamery Package Mfg. Co. v. Wilhite, 149 Ark. 576, 233 S.W. 710, 712 (1921) (statute did not place limitation on liability of bank directors and officers for negligence).

[33] *See* Crews v. Garber, 188 Okla. 570, 111 P.2d 1080, 1082 (1941) (statute provided minimum duties and did not relieve bank directors of common law duties).

[34] *See* Atherton v. Anderson, 302 U.S. 643, 643 (1937)(per curiam)(lower court instructed to consider statutory grounds for liability in addition to common law grounds).

[35] *E.g.*, FDIC v. Berry, 659 F. Supp. 1475, 1478 (E.D. Tenn. 1987)(breach of contractual and common law duties); FDIC v. Williams, 599 F. Supp. 1184, 1190 (D. Md. 1984) (breach of fiduciary duty, fraud, waste, and violation of statutes).

[36] The governing statute provides that subject matter jurisdiction rests on the federal courts except where the FDIC acts solely as receiver of a state bank. 12 U.S.C. § 1819 (Fourth) (1982).

[37] Eureka Fed. Sav. & Loan Ass'n v. Kidwell, 672 F. Supp. 436, 439 (N.D. Cal. 1987).

[38] *Id.* at 439. The court felt that the crisis was in some part due to the "inconsistent

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and ill-advised practices of the various states." *Id.*

[39] *See, e.g.*, Barany v. Buller, 670 F.2d 726, 735 (7th Cir. 1982)(federal interest created remedy under federal common law); First Hawaiian Bank v. Alexander, 558 F. Supp. 1128, 1132 (D. Haw. 1983) (federal common law cause of action for breach of fiduciary duty at federally insured, but not chartered, institution); Rettig v. Arlington Heights Fed. Sav. & Loan Ass'n, 405 F. Supp. 819, 826 (N.D. Ill. 1975) (only federal law may be applied to questions involving fiduciary duties of federal savings and loan officers and directors); City Fed. Sav. & Loan Ass'n v. Crowley, 393 F. Supp. 644, 656 (E.D. Wis. 1975) (federal common law governs breaches of fiduciary duty of officers and directors of federal savings and loans); Beverly Hills Fed. Sav. & Loan Ass'n v. FHLBB, 371 F. Supp. 306, 313 (C.D. Cal. 1973) (same).

[40] *Eureka*, 672 F. Supp. at 439. In *Eureka* an action was brought against former employees, directors, and officers of a federally chartered savings and loan after the FSLIC infused $150,000,000 of capital into the institution to prevent its failure. *Id.* at 437. The suit alleged *inter alia* breach of fiduciary duty, negligence, and waste. *Id.* The district court found that, although the claims based on negligence or waste would be governed by state law, the federal interest in uniform standards for fiduciary duties of officers and directors of federal savings and loans required that a breach of fiduciary duty claim must be governed by federal common law. *Id.* at 441. The court therefore denied the motion to dismiss for lack of subject matter jurisdiction. *Id.*

[41] *See Id.* at 439 (breach of fiduciary duty governed by federal common law, claims of negligence and waste governed by state law); FSLIC v. Sajovich, 642 F. Supp. 74, 77 (C.D. Cal. 1986) (recognized strong support for federal common law action for breach of fiduciary duty).

[42] Federal Sav. & Loan Corp. v. Capozzi, 653 F. Supp. 591, 602 (E.D. Mo. 1987). In *Capozzi* the court held that the FSLIC as conservator must rely on state law. *Id.* In FSLIC v. Braemoor Assoc., 686 F.2d 550, 553-54 (7th Cir. 1982), *cert. denied*, 461 U.S. 977 (1983), the Court of Appeals for the Seventh Circuit used similar reasoning and found that the FSLIC acting as receiver under state law was governed by state substantive law.*Id.* The United States District Court rejected all four asserted bases of federal subject matter jurisdiction offered by the agency in FSLIC v. Huff, 631 F. Supp. 1350, 1351 (D. Kan. 1986) where the FSLIC brought a suit against a former chairman of a savings and loan. *Id.* The agency sought to claim (1) agency jurisdiction, (2) that the action involved the rights of investors, creditors, and stockholders as well as those of the savings and loan, (3) that federal common law controlled, and (4) that as a receiver of a federally insured institution federal subject matter jurisdiction attached. *Id.*

Some courts have been willing to find "agency jurisdiction,"[43] even in dealing with state chartered lenders.[44] Another line of cases holds that when acting as receiver the FDIC is simply attempting to protect its own interests in an effort to minimize losses and hence may bring the action in federal courts.[45] Other courts have rejected the contention that the federal agency may invoke federal subject matter jurisdiction with respect to claims it prosecutes as receiver or conservator of a state chartered lender.[46] These courts find a clear intent in the governing statute to confer jurisdiction upon state courts when the agency is, in substance, functioning as a receiver of a state chartered institution.[47] The question is sometimes resolved by whether the agency is seeking to recover funds it has expended under its own rights of subrogation or whether the agency is simply asserting the rights of the troubled institution in recouping the institution's assets, with only the former conferring jurisdiction.[48] Courts are divided as to whether simple assignment of a claim from the agency, acting as receiver, to the agency as insurer is sufficient to circumvent the statute denying federal jurisdiction when the agency acts solely as a receiver of a state chartered institution.[49]

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[43] Agency jurisdiction over the FSLIC is based on 12 U.S.C. § 1730(k) which provides in the relevant portion:

> Subsection (k). Jurisdiction and enforcement. (1) This subsection would (A) make clear that the orporation is an agency of the United States for purposes of title 28 of the United States Code, (B) provide that any action to which the Corporation shall be a party shall be deemed to arise under the laws of the United States and that the United States district courts shall have original jurisdiction of such actions, without regard to the amount in controversy, and (C) authorize the removal to a Federal court of any such action commenced in a State court. However, actions to which the Corporation is a party in its capacity a receiver for a State-chartered institution and which involve only the rights or obligations of investors, creditors, stockholders, and such institution under State law would not be deemed to arise under the laws of the United States.

12 U.S.C. § 1730(k)(1982).

The jurisdictional statute of the FDIC provides in the pertinent part:

> [T]he Corporation shall become a body corporate and as such, shall have power — . . . .
>
> > Fourth. To sue and be sued, complain and defend, in any court of law or equity, State or Federal. All suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; . . . except that any such suit to which the Corporation is a party in its capacity as receiver of a State bank, and which involves only the rights or obligations of depositors, creditors, stockholders, and such State bank under State law shall not be deemed to arise under the laws of the United States.

12 U.S.C. § 1819 (1982).

[44] *See* Katin v. Apollo Sav., 460 F.2d 422, 424 (7th Cir. 1971)(agency jurisdiction under 12 U.S.C. § 1730(k)), *cert. denied*, 406 U.S. 918 (1972); Gibraltar Bldg. & Loan v. State Sav. & Loan Ass'n., 607 F. Supp. 722, 732 n.2 (N.D. Cal. 1985) (found that "Corporation" within statute included FSLIC when acting as receiver.)

The reasoning has been that the agency, while acting as a receiver, may transfer the claim to the corporate arm of the agency, who has standing to sue in federal court. *E.g.*, FDIC v. Hudson, 643 F. Supp. 496, 497-98 (D. Kan. 1986)(recognized that FDIC exists as two separate and distinct entities in these situations and that corporate entity is separate and may exercise federal jurisdiction in spite of restrictions placed upon the agency as receiver by statute); FDIC v. Buttram, 590 F. Supp. 251, 252-53 (N.D. Ala. 1984)(permitted suit as corporate entity in spite of FDIC reference to itself as "FDIC, in its corporate capacity as receiver. . .").

[45] FDIC v. Wood, 758 F.2d 156, 163 (6th Cir.), *cert. denied*, 474 U.S. 944 (1985).

Based on a provision of the statute restricting jurisdiction, other courts have resolved the jurisdiction question by considering whether the rights and obligations of anyone other than "investors, creditors, stockholders, and [the] institution"[50] are involved[51]. If a party not listed in the proviso denying jurisdiction is included in the action, the agency may then seek relief in the federal courts[52]. Apparently the inclusion of an appraiser or other third party as a defendant in the cause of action would be sufficient to assert federal subject matter jurisdiction where this reasoning is accepted.[53]

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[46] *Federal Sav. & Loan Corp. v. Capozzi*, 653 F. Supp. at 596; *FSLIC v. Huff*, 631 F. Supp. at 1351.

[47] FDIC v. National Sur. Co., 345 F. Supp. 885, 888 (S.D. Iowa 1972). The United States District Court for the Southern District of Iowa found that federal jurisdiction was not created simply because the FDIC had a financial interest in the outcome of the case. *Id.* The court noted that the FDIC often had a financial interest, even though acting as receiver, and if that interest automatically created jurisdiction, the intent of Congress to limit federal jurisdiction would be negated. *Id.*

[48] *See FSLIC v. Huff*, 631 F. Supp. at 1354 (when FSLIC asserts own rights federal jurisdiction applies, but not when rights of lender asserted).

[49] *Compare* FDIC v. Ashley, 585 F.2d 157, 159-60 (6th Cir. 1978) (granting federal jurisdiction based on assigned assets because of distinction between agency acting as receiver and agency in corporate capacity); and FDIC v. Abraham, 439 F. Supp. 1150, 1152 (E.D. La. 1977) (same) *with FSLIC v. Huff*, 631 F. Supp. at 1354 (D. Kan. 1986) (still in essence as receivership action thus no federal jurisdiction).

In order to permit the FDIC to sue as a corporate entity in such a situation, the courts must construe 12 U.S.C. § 1819, the FDIC jurisdictional statute, to not limit the ability of the corporate entity to sue in federal court. Rather the courts adopting this position contend that jurisdiction is governed by 28 U.S.C. § 1345 , the general statute conferring agency jurisdiction. *FDIC v. Abraham*, 439 F. Supp. at 1154-55.

The general jurisdictional statute provides "Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress." 28 U.S.C. § 1345 (1982).

Opponents of thus granting agency jurisdiction argue that 12 U.S.C. § 1819 is the "otherwise provided by Act of Congress" referred to in the general jurisdictional statute, hence the general statute is without effect as to the FDIC. *FDIC v. Abraham*, 439 F. Supp. at 1154.

Defendants in an action brought by the FDIC may receive some solace from the fact that a number of courts have held that any party in an action involving the agency may remove to federal court.[54]

It may be that all state courts should apply federal common law in actions involving federally insured institutions. Alternatively, it may be argued that state law should always provide the rule of decision when the regulator acts as a receiver of a state bank.[55] The Supreme Court of the United States has recognized that courts have "consistently held that federal law governs questions involving the rights of the United States arising under nationwide federal programs."[56] However, the Court has also held that when a national rule is unnecessary to further federal interests, state law should be applied.[57] Certainly, insurance of deposits is so pervasive that the programs may be considered nationwide. The question then becomes whether a national rule is necessary. Other courts have construed the reasoning of the Supreme Court not to require formulation of a federal rule in all circumstances, but rather to require a balancing of factors.[58] Some states have indicated that, at least in certain matters associated with failures of federally insured banks, state courts are to apply federal common law.[59] Failure of the state and federal courts to apply a uniform body of law within a particular state could certainly lead to forum shopping within a state, a practice deplored by the United States Supreme Court.[60] The recognition by courts of federal jurisdiction based on assignment of claims to the corporate entity of the regulator, by including a party not listed in the restrictive provision of the governing statute, and solely on the "interest" of the agency has afforded agencies with the opportunity to forum shop between state and federal courts.

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[50] 12 U.S.C. § 1730(k)(1)(C)(1982). *See supra* note 43 for text of statute.

[51] *See* FSLIC v. Forde, No. 85-774, slip op. at 5 (C.D. Cal. July 3, 1985) (if rights or obligations of third parties not listed in provisons are involved, federal jurisdiction is appropriate). The district court in *Forde* found that since an appraiser and others were involved in the action, in addition to persons listed in the proviso, the federal court could exercise jurisdiction. *Id.*

[52] *FSLIC v. Sajovich*, 642 F. Supp. at 77.

[53] *See* FSLIC v. Forde, No. 85-774, slip op. at 5 (C.D. Cal. July 3, 1985) (inclusion of appraiser in suit justified federal subject matter jurisdiction under the statute). *But see FSLIC v. Huff*, 631 F. Supp. at 1351 (rejected jurisdiction based on claim that rights and obligations of third parties involved).

[54] *See, e.g.*, FDIC v. Otero, 598 F.2d 627, 629 (1st Cir. 1979)(defendant may remove when FDIC intervenes); Franklin Nat'l Bank Sec. Litig. v. Anderson, 532 F.2d 842, 846 (2d Cir. 1976) (all defendants need not agree to remove when FDIC is party); FDIC v. First, 459 F. Supp. 880, 882 (E.D. Wis. 1978)(FDIC substituted as plaintiff may remove).

[55] Platt & Darby, *supra* note 2, at 698. The Federal Deposit Insurance Act provides that actions by the FDIC as receiver of a state bank are not deemed to arise under federal law. *Id.*

[56] United States v. Kimbell Foods, Inc., 440 U.S. 715, 726-29 (1979).

[57] *Id.* at 728.

[58] Gunter v. Hutcheson, 674 F.2d 862, 868 (11th Cir.), *cert. denied*, 459 U.S. 826

IV. STATUTE OF LIMITATIONS

FSLIC v. Williams[61] made it clear that the potential liability of directors and officers of banks and savings and loans may extend for years beyond the actions that give rise to the liability, even if the director or officer leaves the institution.[62] In *Williams*, the FSLIC was permitted to maintain an action against an officer who had resigned three years prior to the commencement of the suit, when the applicable state statute of limitations was only three years.[63] When an agency of the United States brings an action through assignment, a two part inquiry is necessary to determine whether the statute of limitations has run.[64] First, the applicable state statute of limitations must not have run before the assignment.[65] If that period of limitations has not ex-

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(1982). The United States Court of Appeals for the Eleventh Circuit adopted a standard balancing three factors in determining whether to apply federal common law: (1) did the program require national uniformity, (2) would the state law frustrate the objective of the program, and (3) would commercial relations predicated on state law be disrupted by application of federal law. *Id.*

[59] FDIC v. Oehlert, 252 N.W.2d 728, 730 (Iowa 1977).

[60] Erie R.R. v. Thompkins, 304 U.S. 64, 74-75 (1938).

[61] 599 F. Supp. 1184 (1984), *modified*, 622 F. Supp. 132 (D. Md. 1985). In *Williams* several officers and directors were held liable for over $10.4 million, including $610,000 in punitive damages and other directors settled for $1.36 million. *See* Nicholas, *FIRA: Emerging Patterns of Director Liability*, 103 BANKING L. J. 151, 152 n.5 (1986) (discussion of *Williams* case). Of some significance was the fact that *Williams* was the first suit by the FHLBB against directors and officers who had no insurance. *FSLIC Suit Against Former Officers and Directors of Insolvent Savings Institution*, 52 LEGAL BULL. 96, 100 (1986).

[62] *FSLIC v. Williams*, 599 F. Supp. at 1193.

[63] *Id.* at 1190-91. The loan officer, who was not a director, had resigned three years and three months before the agency filed suit. *Id.* at 1191. The Maryland statute of limitations was three years. *Id.*

[64] *Id.* at 1192.

[65] *Id.*

pired, then the inquiry becomes whether the applicable federal statute of limitations[66] has expired.[67] On the date of assignment to the agency the federal statute of limitations begins to run[68] and the state statute of limitations is also tolled.[69] Apparently, assignment to a federal agency may have the effect of exposing a potential defendant to essentially a double period of limitations, depending upon how much of the state limitation period had passed prior to assignment.

The federal discovery rule, which provides that a cause of action does not accrue until it could have been discovered by use of reasonable diligence by a non-culpable person with the authority to bring an action,[70] may perserve the cause of action for years after culpable conduct has occurred. A number of decisions hold that a cause of action does not accrue until culpable directors no longer constitute a majority of the board of directors of the institution.[71] In what is perhaps a better view, some courts maintain that non-culpable directors need not constitute a majority so long as new directors could discover wrongdoing and induce the corporation to sue.[72] The reasoning has been that as long as culpable directors control the institution they may effectively prevent action from being taken against them.[73] Control of the corporation is presumed when such culpable directors maintain a majority on the board.[74] Arguments that application of this rule should be limited to directors, and not officers, have been unavailing.[75]

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[66] 28 U.S.C. § 2415 (1982). The statute provides, in part:

> (a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later; (b) subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues.

Id.

[67] Guaranty Trust Co. v. United States, 304 U.S. 126, 141 (1938).

[68] *FSLIC v. Williams*, 599 F. Supp. at 1193.

[69] United States v. Sellers, 487 F.2d 1268, 1269 (5th Cir. 1973); FDIC v. Buttram, 590 F. Supp. 251, 254 (N.D. Ala. 1984).

[70] 28 U.S.C. § 2416 (1982). The statute provides:

> For the purpose of computing the limitations periods established in section 2415, there shall be excluded all periods during which . . . (c) facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances . . . .

Id.

[71] ITT v. Cornfeld, 619 F.2d 909, 930-31 n. 24 (2d Cir. 1980); Michelsen v. Penney, 135 F.2d 409, 416 n.2 (2d Cir. 1943); Allen v. Wilderson, 396 S.W.2d 493, 500 (Tex. Civ. App. 1965). *See also* FDIC v. Berry, 659 F. Supp. 1475, 1486 (E.D. Tenn. 1987) (cause of action did not accrue until bank was closed by Commissioner of Banking).

Under this discovery rule, even failure to use due diligence to discover culpable conduct may be excused if the defendant has a fiduciary duty to the institution.[76] Officers and directors owe such a fiduciary duty to the corporation.[77] Thus, it would appear that the federal statute of limitations with regard to an officer or director commences running when the culpable conduct should have been discovered, absent negligence, and not when the conduct should have been discovered with due diligence. The combination of the requirement that the board of directors of an institution be controlled by non-culpable individuals, the additional federal statute of limitations, and the federal discovery rule may extend exposure of former directors and officers for years after they are no longer associated with the lender.

V. ASSIGNABILITY OF CLAIMS

The FSLIC and the FDIC have several rights which may not be available to private entities. One of these relates to assignment of claims. Frequently among the assets assigned to the FDIC or FSLIC are tort claims against persons previously involved with the troubled institution. Although several states provide that tort claims are usually not assignable,[78] courts have consistently found that these claims are always assignable to the FSLIC and FDIC.[79] The reasoning has been that the authorization by Congress empowering the FDIC to "purchase any such assets"[80] of an insured bank was an expression of congressional intent that choses in action be assignable.[81]

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[72] Hughes v. Reed, 46 F.2d 435, 441 (10th Cir. 1931). *See* International Ry. of Cent. Am. v. United Fruit Co., 373 F.2d 408 (2d Cir.)(plaintiff seeking to toll statute of limitations has burden of showing full, complete and exclusive control of directors charged), *cert. denied*, 387 U.S. 921 (1967); Payne v. Ostrus, 50 F.2d 1039, 1042 (8th Cir. 1931)(absent claim of fraud, concealment or unusual conditions, statute of limitations begins to run when director resigns).

[73] *FSLIC v. Williams*, 599 F. Supp. at 1193 n.12.

[74] *Id.* at 1195.

[75] *See Id.* at 1194 (loan department manager liable four years after leaving savings and loan).

[76] *Id.* at 1194-95.

[77] *See infra* note 110 and accompanying text.

[78] *See* Midwest Mut. Ins. Co. v. Arkansas Nat'l Co., 538 S.W.2d 574, 579 (Ark. 1976) (action against insurance agent for negligent failure to reinstate held non-assignable as unliquidated tort claim); Murphy v. Allstate Ins. Co., 17 Cal.3d 937, 942, 132 Cal. Rptr. 424, 427, 553 P.2d 584, 587 (1976)(action for punitive damages not assignable); Gruber v. Baker, 20 Nev. 453, 23 P. 858, 862 (1890) (state had adopted common law rule that right

VI. Survivability of Claims

In *FSLIC v. Fielding*[82] the executrix of a defendant sought to have a motion to substitute her as plaintiff denied.[83] Her reasoning was that since punitive damages were sought, then the action was penal in nature and did not survive under Nevada law.[84] The district court brushed aside the question of Nevada law and held that federal law governed survivability of causes of action.[85] The court based its finding on two distinct lines of reasoning. First, the court, via circular logic, noted that federal law governed assignment of causes of action and made this type assignable.[86] Secondly, since at common law actions that could be assigned also survived, this action must survive.[87] The court failed to consider that courts have been virtually unanimous in holding that claims for punitive damages died with the wrongdoer,[88] a

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of action was not assignable). *But see* FDIC v. Buttram, 590 F. Supp. 251, 253 (N.D. Ala. 1984)(tort cause of action against bank director assignable was exception to Alabama rule that tort actions cannot be assigned).

[79] FDIC v. Hudson, 643 F. Supp 496, 498 (D. Kan. 1986); FSLIC v. Fielding, 309 F. Supp. 1146, 1151 (D. Nev. 1969), *cert. denied*, 400 U.S. 1009 (1971); FDIC v. Rectenwall, 97 F. Supp. 273, 274 (N.D. Ind. 1951). *See* First Fed. Sav. & Loan v. Oppenheim, Appel, Dixon & Co., 629 F. Supp. 427, 447 (S.D.N.Y. 1986)(suggesting, but not deciding, that federal law would govern assignability of action for punitive damages to FSLIC).

[80] 12 U.S.C. § 1823 (c)(1982). The statute permitting the insurer to purchase assets provides:

> (1) The Corporation is authorized, in its sole discretion and upon such terms and conditions as the Board of Directors may prescribe, to make loans to, to make deposits in, to purchase the assets or securities of, to assume the liabilities of, or to make contributions to, any insured bank . . . .

Id.

[81] *FDIC v. Rectenwall*, 97 F. Supp. at 274-75.

[82] 316 F. Supp. 82 (D. Nev. 1970)

[83] *Id.* at 83.

[84] *Id.* at 84.

[85] *Id.* at 85.

[86] *Id.* at 84.

[87] *Id.*

[88] *See* Matter of GAC Corp., 681 F.2d 1295, 1301 (11th Cir. 1982)(punitive damages abated on death of tortfeasor); Barnes v. Smith, 305 F.2d 226, 231 (10th Cir. 1962)(found no state case on subject, but stated general proposition); Ford Motor Credit Co. v. Hill, 245 F. Supp. 796, 798 (W.D. Mo. 1965)(applied Missouri law and found punitive damages could not be recovered against estate); Morriss v. Barton, 200 Okla. 4, 190 P.2d 451,

principle sometimes supported by statute.[89] The curious marriage of common law and statute permitted the district court in *Fielding* to bootstrap into an arguably incorrect decision. The second basis for permitting survival of the action lies in the court's interpretation of 28 U.S.C. § 2404 (1982) which provides for survival of actions for damages brought by the United States or in which the United States is interested. [90]The district court relied on the agency jurisdiction accorded actions by the FSLIC by other courts.[91] Thus, the same types of arguments that are relevant to the jurisdictional question would seem to apply to the question of survivability of claims.[92] Jurisdictions that find that the FSLIC and FDIC do not have agency jurisdiction when acting as a receiver for a state chartered institution may well accept the argument that the regulator is not acting as an agency within the contemplation of 28 U.S.C. § 2404.

VII. DIRECTOR AND OFFICER LIABILITY

At common law, corporate directors and officers were found to have three principle duties.[93] They were to act only within their prescribed power.[94] They were to use the degree of care that ordinary pru-

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459-60 (1947)(where defendant dies before trial, executor or administrator cannot be held liable for exemplary damages); First Nat'l Bank of Kerrville v. Hackworth, 673 S.W.2d 218, 220 (Tex. Ct. App. 1984)(common law applicable unless supplanted by survival statute).

[89] *See* Mervis v. Wolverton, 211 So. 2d 847, 848 (Miss. 1968) (statute barred award of vindictive damages against estate of decedent).

[90] 28 U.S.C. § 2404 (1982). Section 2404 states "a civil action for damages commenced by or on behalf of the United States or in which it is interested shall not abate on the death of a defendant but shall survive and be enforceable against his estate as well as against surviving defendants." *Id.*

An action for "damages" within contemplation of the statute must be an action to compensate the United States for injury. United States v. Price, 290 F.2d 525, 527 (6th Cir. 1961). An action for recovery of a penalty abates upon the death of the defendant. *Id.*

[91] *FSLIC v. Fielding*, 316 F. Supp. at 85. The *Fielding* court relied on Acron Inv., Inc. v. FSLIC, 363 F.2d 236 (9th Cir.), *cert. denied*, 385 U.S. 970 (1966).

[92] *See supra* notes 35-53 and accompanying text. It may be argued that a court rejecting "agency" jurisdiction in this circumstance would find that state law governed survivability.

[93] German & Gallagher, *Liability of Corporate Officers and Directors: A Brief Survey of an Expanding Field*, 30 FED. OF INS. COUNS. Q. 187, 188 (1980).

[94] *See, e.g.*, Flannery Bolt Co. v. Flannery, 16 F. Supp. 803, 805 (W.D. Pa. 1935)(directors and officers must act within power and not engage in *ultra vires* acts), *modified*, 86 F.2d 43 (3d Cir. 1936).

dent persons would use in their own affairs.[95] Finally, directors or officers were to not place their personal advantage over that of the corporation.[96] Commentators[97] and some courts[98] have recognized that directors of savings institutions are, in effect, held to a higher standard of care than directors of other types of corporations.[99] Occasionally, this finding is based on a statute defining bank director duties.[100] For example, statutes may fix on the director the presumption of knowledge of any violation of banking laws by the lender.[101] Perhaps as a result of this higher standard, directors and officers of banks and savings and loans are particularly susceptible to suit. FDIC spokesmen readily admit that the agency always sues officers and directors whenever a bank fails.[102]

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[95] *E.g.*, Bellis v. Thal, 373 F. Supp. 120, 123 (E.D. Pa. 1974)(holding that standard is diligence that prudent man would exercise in his own affairs under similar circumstances), *aff'd*, 510 F.2d 969 (3d Cir. 1975).

[96] Vulcanized Rubber & Plastics Co. v. Scheckter, 400 Pa. 405, 162 A.2d 400, 405 (1960).

[97] Ererle & Genirs, *When Change Meets Tradition: the Paradox of Thrift Director Liability*, 6 ANN. REV. OF BANKING L. 413, 414-15 (1987).

[98] *E.g.*, Gadd v. Pearson, 351 F. Supp. 895, 903 (M.D. Fla. 1972)(bank directors owe higher duty than other directors); FSLIC v. Huff, 237 Kan. 873, 704 P.2d 372, 378 (1985) (discussing legislative intent to impose higher standards on savings and loan officers than officers of ordinary for profit corporations); Francis v. United Jersey Bank, 187 N.J. 15, 37, 432 A.2d 814, 825 (1981) (confidence reposed in bank required director to exercise higher degree of care); Litwin v. Allen, 25 N.Y.S. 2d 667, 678 (Sup. Ct. 1940)(bank directors held to stricter accountability); Broderick v. Marcus, 152 Misc. 413, 272 N.Y.S. 455, 461 (1934)(stricter standard because bank directors had trust responsibility over depositors' funds).

[99] Bishop, *Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers*, 77 YALE L.J. 1078, 1099 (1968). Professor Bishop noted that seldom was a director of an industrial or mercantile corporation found liable for "mere" negligence. *Id.* This is not a universal rule, however, and directors have been found personally liable for simple negligence in some instances. *See, e.g.*, Selheimer v. Manganese Corp., 423 Pa. 563, 224 A.2d 634, 646 (1966)(negligence sufficient to impose liability). *See also* Comment, *Informed Decisionmaking by Directors: The Director's Right to Rely Versus the Duty to Investigate*, 55 MISS. L.J. 571, 571-72 n. 5 (1985) (standard of care varies by state).

Generally, corporate directors still face many bases of liability. *See* Goldstein & Shepard, *Director's Duties and Liabilities Under the Securities Acts and Corporation Law*, 36 WASH. & LEE L. REV. 759, 759 n.2 (1979)(noting existence of at least 133 grounds for suing directors for malfeasance or misfeasance).

[100] Noll v. Boyle, 36 P.2d 330, 331 (Kan. 1934). The Supreme Court of Kansas refused to charge corporate directors with the knowledge of its affairs to the same degree that a statute required bank directors to have such knowledge. *Id.*

Until very recently, the trend had been to bring suit against directors of all types of corporations on statutory bases rather than for violation of a common law duty. German & Gallegher, *supra* note 93, at 189. Recent developments suggest a re-emphasis on common law duties as the basis of legal actions. *Id.*

[101] *E.g.*, N.Y. BANKING LAW § 674 (McKinney 1971)(bank director presumed to know if any of activities of bank violate banking laws).

Another distinction between bank directors and directors of other corporations lies in the treatment of outside directors.[103] Generally, in ordinary corporations, outside directors are held to less exacting standards than inside directors and officers.[104] This distinction has not been afforded to outside directors of banks, who are held by courts to the same standards as inside directors.[105] Some commentators maintain that the differences between large and small banks should be given some consideration in developing a standard of care for outside directors.[106] Typically, they argue, a director of a small bank is neither a banking expert nor a business manager.[107] They are chosen only on their ability to bring business to the bank.[108] Large banks, on the other hand, tend to choose professional managers, often top executives of corporate clients of the bank.[109]

A. *Breach of Fiduciary Duty*

Directors and officers are held by courts to be in a fiduciary relationship with a corporation.[110] When there is a failure of a bank or savings and loan, the regulators look closely for instances of violation of the trust reposed in these persons.[111] This concern is not unwarranted.[112] Statistics indicate that losses to financial institutions caused by insider misconduct are now eight times as great as losses due to bank robberies.[113] The resulting losses are believed to have contributed to from forty five percent to sixty one percent of all bank failures[114] and to a smaller percentage of savings and loan failures.[115] These breaches of fiduciary duty involve more than clear acts of criminal conduct. They frequently fall into gray areas of conflict of interest. As a fiduciary, the bank director owes the institution "duties of loyalty and diligence in the management of its affairs."[116] The "business judgment rule"[117], the primary defense in actions based on negligence,[118] is unavailable when the claim is breach of fiduciary duty.[119]

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[102] Norcross, *supra* note 26, at 345 (statement of P. Baker, Remarks at the Eighth Annual Banking Law Institute).

[103] Note, *Safe Harbors and Stormy Seas: Trends and Countertrends in Outside Director Liability*, 47 Brooklyn L. Rev. 359, (1981).An outside director is one who is not an officer, employee, or other person regularly compensated for services other than acting as a director. *Id.* at 360.

[104] German & Gallagher, *supra* note 93, at 189. This reluctance to impose liability may rest in the fact that outside directors spend very little time working for the corporation. A 1982 survey indicated that they averaged only 123 hours per year on corporate business. Chittur, *The Corporate Director's Standard of Care: Past, Present, and Future*, 10 Del. J. Corp. L. 505, 533 (1985).

[105] Comment, *A Realistic Duty of Care for Outside Bank Directors*, 51 Tenn. L. Rev. 569, 570 (1984).

[106] *E.g.*, Hawke, *The Limited Role of Directors in Assuring the Soundness of Banks*, 6 Ann. Rev. of Banking L. 285, 286-87 (1987).

[107] *Id.* at 286. Small banks attract directors based on the honor attached to the position. Banks & Hoskins, *Liability and Responsibility of Bank Directors: Being Alert to Troubled Times*, 72 Ky. L.J. 639, 639 (1984).

[108] Hawke, *supra* note 106, at 287.

[109] *Id. See* Banks & Hoskins, *supra* note 107, at 639 (large institutions hire professional directors).

[110] FDIC v. Buttram, 590 F. Supp. 251, 255 (N.D. Ala. 1984) (court examines nature of director's fiduciary duty to determine if exception may be found so as to bypass statute of limitations bar); FSLIC v. Fielding, 343 F. Supp. 537, 544 (D. Nev. 1972) (case

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involving corporate management team who were also associates of law firm acting as general counsel for corporation, held not disqualified to act as directors or officers); Bailey v. Jacobs, 325 Pa. 187, 189 A.2d 320, 324 (1937) (transaction in question involved corporate money used to purchase assets later transferred to another corporation of which director was president).

Mississippi makes directors and officers of savings associations fiduciaries of the association. MISS. CODE ANN. § 81-12-87 (Supp. 1987).

[111] Regulators look to bank directors as the "first line of defense against most bank problems." Hawke, *supra* note 106, at 286.

[112] The Comptroller of the Currency has stated that almost every problem bank situation involves self-dealing. H.R. REP. 1383, 95th Cong., 2d Sess. 10-12, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 9273, 9282-84. An FDIC study of failures between 1960 and 1975 indicated that insider loans led to nearly sixty percent of those bank failures. *Id. See* Fitzpatrick v. FDIC, 765 F.2d 569, 574 n.2 (6th Cir. 1985)("Problem banks and insider abuses have been virtually synonymous").

[113] N.Y. Times, Oct. 2, 1984, at D18, col. 5. The FBI estimates that in 1982, $401.6 million was taken from banks by internal fraud or embezzlement. *Id.*

[114] Wall St. J., Jan. 30, 1985, § 2, at 29, col. 4. During the period 1980 to 1983, forty-five percent of all bank failures were due to insider misconduct, according to FDIC estimates. *Id.* Congress feels that the forty-five percent estimate is too low, they argue that their own estimate of sixty-one percent is conservative. *Federal Response*, *supra* note 6, at 30.

[115] *Federal Response*, *supra* note 6 at 30. Congress is uncertain of the number of savings and loan failures caused by insider misconduct. *Id.* They suggest that the figure is approximately half that of bank failures similarly caused. *Id.*

[116] Vartanian and Schley, *supra* note 2, at 1029.

[117] The business judgment rule was developed to insulate management from personal liability for making business decisions. Chittur, *supra* note 104, at 507. The rule protects both officers and directors. *Id.*

[118] Deal, *Liability of Bank Directors*, 39 BUS. LAW. 1033, 1038 (1984)(this article developed from a paper presented by the Committee on Banking Law before the annual meeting of the American Bar Association in 1983).

[119] Joy v. North, 692 F.2d 880, 886 (2d Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983).

Examples where breach of fiduciary duties have been alleged include "golden parachutes" created when a savings institution was in difficulty.[120] These are especially egregious in that they effectively reward those who led the troubled institution "down the primrose path to failure."[121] Loans to insiders have been challenged as breaches of fiduciary duties.[122] Even knowledge of another person's conflict of interest may result in allegations of breach of fiduciary duty based on failure to disclose the conflict as shown by *In Re: Illinois Valley Acceptance Corp.*, where a lender sued two directors for breach of fiduciary duties resulting from a conflict of interest that one director had concerning a loan.[123] One director was found liable for conflict of interest and the other for lack of due care for failure to discover the conflict.[124]

B. Negligence

Directors who fail to make efforts to obtain information on the happenings of the corporation have found that such ignorance, in itself, is a breach of fiduciary duty.[125] Directors are often charged with negligence when the lending institution suffers loss to the extent that

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The Court of Appeals for the Second Circuit held that the business judgment rule does not apply where a decision lacks a business purpose, is tainted by conflict of interest, has no potential to profit the corporation, or results from prolonged absence of oversight or supervision. *Id.*

[120] In FSLIC v. Bass, 576 F. Supp. 848, 852 (N.D. Ill. 1983), the District Court for the Northern District of Illinois allowed the FSLIC to recover $200,000 that had been put into escrow to provide a "golden parachute" for officers and directors shortly before a savings and loan became insolvent. *Id.*

Other actions filed to recover "golden parachute" funds include FSLIC v. Cini, No. 2759 (S.D.N.Y. filed April 11, 1983); FSLIC v. Ticktin, No. 83-2996 (E.D. Ill. filed Aug. 2, 1983), *dismissed for lack of subject matter juris.*, 823 F.2d 1438 (7th Cir. 1987); and Cross v. First Sav.& Loan Ass'n, No. 3-81-1072 (D. Minn. filed Dec. 17, 1981).

[121] Hawke, *supra* note 106, at 289. A noteworthy example involved the Continental Illinois Bank where shortly, before it was salvaged by the FDIC, the directors approved substantial golden parachutes for management. *Id.*

[122] *See, e.g.*, FSLIC v. Geisen, 392 F.2d 900, 902 (7th Cir. 1968)(savings and loan association purchased chairman's loan from bank in violation of statute).

[123] 531 F. Supp. 737, 739 (C.D. Ill. 1982). One director failed to disclose his conflict of interest when he voted to extend a loan to a corporation in which he was also a director. *Id.* at 740. Another director knew of the conflict but failed to disclose it. *Id.* Both were sued for breach of fiduciary duty in bankruptcy court. *Id.* at 739. The district court affirmed judgment against both. *Id.* at 741.

[124] *Id.* at 740-41.

[125] *Joy*, 692 F.2d at 896. The facts in *Joy* involved a shareholder derivative suit against officers of a bank. *Id.* at 882. Connecticut law was applied. *Id.* at 888.

the federal insurers become involved. However, determining exactly what constitutes negligent conduct may be a problem. The common law is sometimes inconsistent in defining the standard of care required of individuals in these positions.[126] The standard may require that a bank director exercise the same level of care as ordinary prudent men exercise in their own affairs.[127] An alternative standard requires that he act as a reasonably prudent bank director.[128] The Supreme Court of the United States in *Briggs v. Spaulding*[129] has stated that "directors must exercise ordinary care and prudence in the administration of the affairs of a bank."[130]

A small majority of states use only common law to derive a director's standard of care, while the rest have statutes defining the standard.[131] All of the statutes generally require "care of an ordinarily prudent person in like position and under similar circumstances."[132] Only California has codified a requirement of "reasonable inquiry."[133]

One example of the confusion surrounding director's standards involves the failure of a director to discover another person whose acts have caused the institution to suffer loss.[134] The federal common law governing such a situation would appear to have been stated by the United States Supreme Court in *Briggs v. Spaulding*.[135] In that early case, the receiver of a failed bank sued the directors of the institution.[136] One of the claims asserted was that the directors failed to discover certain actions by the president of the bank which ultimately led to its failure.[137] The Court held that a bank director ought not avoid liability because of his lack of knowledge "if that ignorance is the result of gross inattention."[138] This requirement of gross inattention has been rejected by some state courts.[139] These courts have adopted the reasoning of the four dissenting justices in *Briggs* who found that directors should be charged with the knowledge of what they should have discovered by "ordinary diligence".[140] The courts of other states have adhered to the requirement of gross negligence and have rejected claims based on simple negligent failure to discover improper activities.[141] There is clearly a tendency to tighten the standard set forth in *Briggs*.[142] As the complexities of banking increase, the feeling has become that the lenient standard of *Briggs* is no longer adequate.[143]

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[126] *Compare* Anderson v. Bundy, 161 Va. 1, 171 S.E. 501, 507 (1933)(standard is ordinary prudent bank director) *with* Ellis v. H. P. Gates Mercantile Co., 103 Miss. 560, 574, 60 So. 649, 650 (1913) (standard is degree of care and prudence exercised by business men in their own affairs). And *compare* Wallace v. Lincoln Savings, 89 Tenn. 630, 15 S.W. 448, 453 (1891)(failure to attend meetings or turn over management to exclusive control of agents constitutes gross neglect) *with* Department of Banking v. Colburn, 188 Neb. 500, 198 N.W.2d 69, 74 (1972)(director abdicated responsibilities completely, yet not liable as a matter of law).

[127] Commercial Bank of Bay City v. Chatfield, 121 Mich. 641, 80 N.W. 712, 714 (1899)(involving jury instruction on standard to be applied to bank president); Department of Banking v. Colburn, 188 Neb. 500, 198 N.W.2d 69, 73 (1972) (court held that cashier-director was negligent under this standard in not discovering misappropriation of funds by bank president); Hanna v. Lyon, 179 N.Y. 107, 71 N.E. 778, 779 (1904) (stockholder of bank allowed to bring action against bank directors when bank fail to pursue action). This standard has been referred to as the "New York Rule." *Anderson*, 171 S.E. at 507.

[128] *Anderson*, 171 S.E. at 507.

[129] 141 U.S. 132 (1891).

[130] *Id.*

[131] Chittur, *supra* note 104, at 508-09. Only twenty-two states have adopted statutory provisions for corporate directors generally. *Id.* at 509.

[132] *Id.*

[133] CAL. CORP. CODE § 309(a) (West 1977).

[134] There have been situations where a director, through his lack of knowledge, has been placed in a position where to resign from his post would constitute a breach of duty to a corporation. *E.g.*, DePinto v. Provident Sec. Life Ins. Co., 374 F.2d 37, 44 (9th Cir. 1967)(director had duty to decline to resign and to notify shareholders of plan to loot

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company), *cert. denied*, 389 U.S. 822 (1967). The Ninth Circuit rejected an argument that the defendant had already resigned from the company prior to a vote to transfer assets. *Id.* An award was upheld based on failure to investigate. *Id.* at 45.

[135] 141 U.S. 132 (1891).

[136] *Id.* at 134. The Comptroller of the Currency appointed the receiver when the bank became insolvent in 1882. *Id.*

[137] *Id.* at 142. The cause of action was framed upon a breach of duty as a trustee of a financial institution and breach of obligations imposed by statute. *Id.* The statute provided that losses occasioned by violation of the statute would become the personal liabilities of the directors who were responsible for the violation. *Id.* at 144.

[138] *Id.* at 166.

[139] Bank of Commerce v. Goolsby, 129 Ark. 416, 196 S.W. 803, 810 (1917). In *Goolsby* a group of stockholders sued directors of a bank after it went into liquidation. *Goolsby*, 196 S.W. at 804. The action was based largely upon the failure of the directors to discover and correct certain improvident loans made by the cashier of the bank. *Id.* at 806 - 07. The Supreme Court of Arkansas expressly rejected the reasoning of the majority in *Briggs* that there must be gross inattention. *Id.* at 810. Instead, the state court adopted the reasoning of the dissent in *Briggs*. *Id. See* Green v. Officers & Directors of Knoxville B. & T. Co., 133 Tenn. 609, 182 S.W. 244, 247 (1915) (allegation of failure to use reasonable diligence to discover fraud held sufficient to state claim).

[140] *Briggs*, 141 U.S. at 170.

[141] Cornick v. Weir, 212 Iowa 715, 237 N.W. 245, 251 (1931). The Iowa court believed that to apply a "mere neglect" standard would require a director to stay in the bank every moment. *Id.*

[142] *E.g.*, Anderson v. Bundy, 161 Va. 1, 171 S.E. 501, 507 (1933). The Supreme Court of Virginia stated that *Briggs* was relied upon by those who would deal leniently with bank directors. *Id.* at 506.

[143] *Id.* at 508 (yesterday's standards are inadequate).

The problem of director liability for acts of other employees becomes even more difficult when the director relies upon the representations of the culpable employee.[144] At common law the director had the right to rely upon the honesty of subordinates unless some reason for suspicion existed.[145] Some feel that the MODEL BUSINESS CORPORATIONS ACT[146] removes the requirement of suspicious circumstances before a director must investigate rather than rely upon others.[147] Some states have addressed the question, and have enacted reliance statutes which authorize directors to rely upon subordinates, at least in particular matters.[148] These statutes do not affect the requirement of investigation when the director has reason to believe reliance is unwarranted.[149]

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[144] *See* Comment, *supra* note 99, at 573 (discussing right of director to rely on statements of corporate employees).

[145] FDIC v. Boone, 361 F. Supp. 133, 165-66 (W.D. Okla. 1972). Officers and directors are not required to anticipate dishonest acts, and may, depending upon circumstances, be permitted to rely on explanations given by employees for suspicious conduct. *See* First Nat'l Bank v. Security Mut. Ins. Co., 431 F.2d 1025, 1028 (10th Cir. 1970), *cert. denied,* 401 U.S. 975 (1971).

[146] MODEL BUS. CORP. ACT § 8.30(a)(2)(1984). This section requires that a director exercise reasonable care when relying upon others.*Id.*

[147] Comment, *supra* note 99,at 573 n.9.

[148] *See, e.g.*, CONN. GEN. STAT. ANN. § 33-313 (West Supp. 1985) (director may rely on officers, employees whom officer or director reasonably believes reliable, also attorney, accountant, or committee on which director does not serve); Ga. Code Ann. § 7-1-490 (1982) (same); MASS. GEN. LAWS ANN. ch. 156B, § 65 (West Supp. 1985)(director may rely upon information, opinions, reports, and records from employees or corporation, professionals, experts, and committees); MINN. STAT. ANN. § 302 A. 251 (West 1985)(same as Georgia); MISS. CODE ANN. § 79-4-8.42(b) (1988) (director may rely on corporate financial statement represented as correct by officer in charge of corporate books); N.Y. BUS. CORP. LAW § 717 (McKinney Supp. 1984)(director may rely on any information from officers, employees, professionals, and committees); TENN. CODE ANN. § 48-1-813 (1984)(director may rely on financial statements presented by president or officer in charge of books or accountant).

[149] *See, e.g.*, MODEL BUS. CORP. ACT § 8.30(b)-(c) which provides:

> In discharging his duties a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared by:
>
> (1).one or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;
>
> (2).legal counsel, public accountants, or other persons as to matters the director reasonably believes are within the person's professional or expert competence; or
>
> (3).a committee of the board of directors of which he is not a member if the director reasonably believes the committee merits confidence. A director is not acting in good faith if he has knowledge concerning the matter in question that makes reliance otherwise permitted . . . unwarranted.

Id.

Other states have moved in the opposite direction and have specifically exempted directors of savings and loans from reliance statutes.[150]

One type of negligence often urged in a suit against a director is failure to adequately supervise the operations of the bank or savings and loan.[151] These cases may involve failure to discover criminal activity on the part of a bank employee,[152] failure to act to prevent improper insider activities,[153] or failure to discover or act to curb what are commonly referred to as "unsound banking practices",[154] a term that Congress has never defined.[155] Some courts have simply rejected liability when the director is merely negligent in discovering improper activities.[156] Others apply a stricter standard of conduct and have been willing to impose liability upon directors in spite of their lack of awareness of unsound lending practices within the institution.[157] The reasoning has been that a director is presumed to know everything that could have been learned from the institution's ledgers, books, and correspondence absent gross neglect,[158] a view that may be based on statute.[159] The Supreme Court of Mississippi has adopted the stricter standard and has stated that bank directors are conclusively presumed to know at all times the financial condition of the bank.[160] Further, they are charged with knowledge of the character and habits of the officers of the bank.[161] This standard appears to establish liability for conduct less culpable than gross neglect.

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[150] FSLIC v. Huff, 237 Kan. 873, 704 P.2d 372, 378 (1985). The Kansas court found that a statute permitting directors of ordinary corporations to rely on the reports of officers or appraisers did not apply to directors of savings and loans. *Id.* Hence, the court reasoned, directors of savings and loan associations lacked the statutory defense of reliance. *Id.*

[151] *E.g.*, Preston v. Prather, 137 U.S. 604, 612 (1890) (bank directors liable for failure to supervise dishonest cashier); Lippitt v. Ashley, 89 Conn. 451, 94 A. 995, 1002 (1915) (bank director liable for failure to supervise officer).

[152] *See, e.g.*, FDIC v. Boone, 361 F. Supp. at 145 (forgery by president); Department of Banking v. Colburn, 188 Neb. 500, 198 N.W.2d at 71 (embezzlement by president); Anderson v. Bundy, 161 Va. 1, 171 S.E. at 505 (embezzlement by cashier).

[153] *See, e.g.*, Francis v. United Jersey Bank, 162 N.J. Super. 355, 392 A.2d 1233, 1236 (Law Div. 1978)(payments to principal stockholder without consideration), *aff'd*, 87 N.J. 15, 432 A.2d 814 (1981); King v. Ballard, 643 S.W.2d 457, 463 (Tex. Ct. App. 1982)(loans to president in excess of lending limits), *modified*, 652 S.W.2d 767 (Tex. 1983).

[154] *See, e.g.*, Alliance Fed. Sav. & Loan Ass'n v. Federal Home Loan Bank Bd., 782 F.2d 490,494 (speculative loans, inadequate pre-loan approval, and insufficient security), *modified*, 790 F.2d 34 (5th Cir. 1986); FSLIC v. Bass, 576 F. Supp. 848, 852 (N.D. Ill. 1983)(payment of bonus to officers when bank in trouble deemed unsound practice).

[155] Comment, *Gulf Federal Savings and Loan v. Federal Home Loan Bank Board: A New Judicial Attitude Toward the Regulation of Financial Institutions*, 31 BUFFALO L. REV. 233, 240 (1982) (despite lack of clear definition of term Congress refers to it in nearly every enforcement statute available to banking agencies).

Although Congress has not defined what constitutes unsafe and unsound practices, it has empowered the Home Loan Bank Board to issue cease and desist orders against savings and loans engaging in such practices. 12 U.S.C. § 1454(d)(2)(A) (1982).

The Court of Appeals for the Fifth Circuit has interpreted the term to be restricted to "practices with a reasonably direct effect on an association's financial soundness." Gulf Fed. Sav. & Loan v. FHLBB, 651 F.2d 259, 264 (5th Cir. 1981), *cert. denied*, 458 U.S. 1121 (1982).

[156] *See, e.g.*, Cornick v. Weir, 212 Iowa 715, 237 N.W. 245, 250 (1931)(holding director liable for negligent failure to discover misconduct would lead to absurdity); Department of Banking v. Colburn, 188 Neb. 500, 198 N.W.2d 69, 72 (1972) (director/cashier not familiar with statutes or directives governing bank yet held not negligent); Jones v. First State Bank, 158 Tenn. 356, 13 S.W.2d 326, 327 (1929) (director not presumed to know all that would be shown by corporate books).

Courts have traditionally recognized that directors are not expected to be involved in the day to day operations of the institution.[162] Regulations provide that a director of a national bank "may not delegate responsibility for duties, but may assign the performance thereof."[163] Thus, while performance may be delegated, responsibility may not.[164] Some state courts have found that matters involving discretion may not be delegated, and to do so constitutes negligence.[165] Occasionally courts will excuse reliance upon a trusted officer of the institution if there is no reason to call the attention of the director to a potential problem.[166]

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[157] *See, e.g.*, Bank of Commerce v. Goolsby, 129 Ark. 416, 196 S.W. 803, 810 (1917)(court rejected requirement of gross inattention); Green v. Officers & Directors of Knoxville Banking & Trust Co., 133 Tenn. 609, 182 S.W. 244, 247-49 (1915)(allegations of simple negligence of director sufficient to overrule demurrer).

[158] United Soc'y of Shakers v. Underwood, 72 Ky. (9 Bush) 609, 621 (1873).

[159] *See* FSLIC v. Huff, 237 Kan. 873, 704 P.2d 372, 378 (1985) (Kansas Savings and Loan Code does not permit directors to rely on books of institution or reports made to it).

[160] Ellis v. H. P. Gates Mercantile Co., 103 Miss. 560, 574, 60 So. 649, 650 (1913)(when directors accept their position they are bound to perform all such duties with care and prudence and should not delegate important duties).

[161] *Id.*

[162] *See, e.g.*, Bowerman v. Hamner, 250 U.S. 504, 512 (1919)(executive officers of bank transact its business under direction of board of directors); *Briggs*, 141 U.S. at 163-64 (directors not required to make separate investigation).

[163] 12 C.F.R. § 7.4425 (1987).

[164] Some state court decisions imply that discretionary functions of a board of directors cannot be delegated. *See* Haldeman v. Haldeman, 176 Ky. 635, 197 S.W. 376, 381 (1917) (noted that some courts have held that matters involving discretion cannot be delegated).

[165] Union Nat'l Bank v. Hill, 148 Mo. 380, 49 S.W. 1012, 1014 (1899). The Missouri court held that the making of loans and discounts could not be delegated and to do so was negligence. *Id. See also Haldeman*, 176 Ky. 635, 197 S.W. at 382 (noted that courts had held that matters involving discretion were not delegatable).

Numerous kinds of conduct have supported imposition of liability for negligence. The failure to attend board of directors meetings has been found sufficient.[167] Actions have been brought against directors and officers because of imprudent practices relating to investments and loans.[168] The concentration of funds in risky construction loans has also been attacked.[169] The granting of disbursements to borrowers without adequate inspection reports,[170] and the making of inadequately secured loans have provided further grounds for suit.[171] Clearly, directors must be more than figureheads.[172]

C. *Breach of Contract*

Each director of a national bank must take an oath.[173] Most states require similar oaths of directors of state chartered institutions.[174] Attempts by regulator to use these oaths as a basis for breach of contract actions against directors have been rejected.[175]

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[166] *E.g.*, FDIC v. Boone, 361 F. Supp. 133, 164 (W.D. Okla. 1972)(directors relied on bank president when they investigated but failed to uncover his check kiting scheme).

[167] *E.g.*, Bank of Commerce v. Goolsby, 129 Ark. 416, 196 S.W. 803, 812 (1917)(fact that director failed to attend meetings as often as others would tend to show that he was more negligent); Ellis v. H.P. Gates Mercantile Co., 103 Miss. 560, 574, 60 So. 649, 649 (1913) (failure to hold director meetings held to be gross neglect); *Francis*, 87 N.J. 15, 432 A.2d at 823 (liability for absence at meetings); Crews v. Garber, 188 Okla. 570, 111 P.2d 1080, 1082 (1941) (failure to attend any of seventeen meetings stated cause of action).

[168] *See* FSLIC v. Capozzi, 653 F. Supp. 591, 602 (E.D. Mo. 1987) (counts alleged what court termed "ill-advised business transactions").

[169] FSLIC v. Williams, 622 F. Supp. 132, 135 (D. Md. 1985), *modified in*, FSLIC v. Reeves, 816 F.2d 130 (4th Cir. 1987).

[170] FSLIC v. Williams, 599 F. Supp. 1184, 1191 (D. Md. 1984), *modified in*, FSLIC v. Reeves, 816 F.2d 130 (4th Cir. 1987).

[171] FSLIC v. Huff, 237 Kan. 873 , 704 P.2d 372, 375 (1985). These loans were grossly undersecured. Several major loans were authorized against collateral valued at as little as one-fifth the amount of the loan. *Id.* at 375-76. In an action that was not a suit for indemnification, the Court of Appeals for the Sixth Circuit upheld civil fines under the Financial Institutions Regulatory Act for violation of fiduciary duties when a director permitted use of unperfected security interests as collateral for loans. Fitzpatrick v. FDIC, 765 F.2d 569, 577 (6th Cir. 1985).

[172] *Briggs*, 141 U.S. at 165; *Francis*, 162 N.J. Super. 355, 392 A.2d at 1242. *See* McEwen v. Kelly, 140 Ga. 720, 79 S.E. 777, 779 (1913) (figureheads may awake to find liability).

[173] 12 U.S.C. § 73 (1982). The director must affirm that he will diligently and honestly administer the affairs of the bank and will not knowingly violate, or permit the bank to violate, any banking law. *Id.*

[174] Nicholas, *supra* note 61, at 179. Mississippi requires that the director of a state bank take an oath annually "that he will faithfully and diligently perform the duties of his office and will not knowingly violate or permit to be violated any provision of law."

D. Statutory Liability

In addition to common law bases for actions against officers, directors and others involved with troubled lenders, there are statutory bases of liability. The Financial Institutions Regulatory and Interest Rate Control Act of 1978 (FIRA)[176] permits regulators to assess penalties for violation of statutes or for failure to comply with a regulator's cease-and- desist order.[177] These penalties may be assessed directly against the individuals involved.[178] Of greater significance, however, is the potential power of regulators to require officers and directors to indemnify the lender for any losses resulting from the violations.

Regulators have attempted to simply issue orders requiring officers and directors to stand personally liable for losses to the institution. The United States Court of Appeals for the Ninth Circuit in *del Junco v. Conover*[179] permitted regulators this power.[180] The Ninth Circuit noted that the Comptroller of the Currency has broad discretion to fashion remedies for violation of banking laws.[181] The court went on to uphold an order by the Comptroller which required bank directors to indemnify the bank for $350,000 in loans and to pay all collection expenses and attorney fees.[182] The significance of *del Junco* goes beyond the ability of the Comptroller of the Currency to impose personal liability without a court proceeding. By establishing personal liability for indemnification based on the FIRA, the Ninth Circuit imposed an ad-

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Miss. Code Ann. § 81-5-45 (1972). A similar oath is provided for directors of savings associations. Miss. Code Ann. § 81-12-83 (Supp. 1987).

[175] *See* FDIC v. Hudson, 643 F. Supp. 496, 498 (D. Kan. 1986) (argument by FDIC that oath created either express or implied contract was rejected).

[176] Pub. L. No. 95-630, 92 Stat. 3641 (codified as amended at 12 U.S.C. § 1818 (1982). The Act amended statutes regulating banks and savings and loans. Nicholas, *supra* note 61, at 153.

[177] Nicholas, *supra* note 61, at 152-53. The Act provides for civil penalties of up to $10,000 per day for violation of certain laws. *Id.* at 158-59.

[178] *Id.* at 153.

[179] 682 F.2d 1338 (9th Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983).

[180] *Id.* at 1342.

[181] *Id.* at 1340.

[182] *Id.* at 1342-43. The directors had authorized three loans which, although nominally were to different parties, were for the benefit of a single borrower. *Id.* at 1339. The loans, thus combined, exceeded the legal lending limits of the bank under 12 U.S.C. § 84 (1982). *Id.* The Comptroller issued an order which required the directors to indemnify the bank for the amount of the loans in excess of the lending limit. *Id.*

ditional burden on bank directors. Previously, directors had been liable for losses for violations of the National Bank Act under 12 U.S.C. § 93(a)(1982),[183] and directors and officers had been liable for violations of the Federal Reserve Act under 12 U.S.C. § 503 (1982).[184] The *del Junco* ruling appears to expand directors' personal liability for losses resulting from "unsafe or unsound banking practices" in a mere agency proceeding.[185] Whether indemnification under the FIRA may be ordered by an agency based on negligence is uncertain. The *del Junco* court declined to decide the appropriate scienter requirement under the FIRA.[186] In *Fitzpatrick v. FDIC*, [187] the Court of Appeals for the Sixth Circuit upheld an agency's imposition of civil penalties under the FIRA against a bank director on the basis of negligence.[188] This ruling could be urged as a basis for the agency requiring indemnification based on mere negligence. The reach of agencies under the FIRA extends to officers, employees, agents, or others participating in the affairs of the institution.[189] Prior to these rulings, agencies had the right to seek indemnification for violation of statutes only from directors or, if the bank was a member of the Federal Reserve System, from directors and officers.[190]

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[183] 12 U.S.C. § 93(a) provides:

> If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this chapter, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper district or Territorial court of the United States in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person shall have sustained in consequence of such violation.

Id.

[184] Section 503 provides:

> If the directors or officers of any member bank shall knowingly violate or permit any of the agents, officer, or directors of any member bank to violate any of the provisions of this section [governing Federal Reserve System] or regulations of the board made under authority thereof, of any of the provisions of sections [list of specific sections] every director and officer participating in or assenting to such violation shall be held liable in his personal and individual capacity for all damages which the member bank, its shareholders, or any other persons shall have sustained in consequence of such violation.

12 U.S.C. § 503 (1982).

[185] Nicholas, *supra* note 61, at 165-66.

[186] *Del Junco*, 682 F.2d at 1342.

[187] 765 F.2d 569 (6th Cir. 1985).

[188] *Id.* at 577-78. The court upheld an assessment of civil penalties against a president and director of a bank who had failed to determine that two loans should have been aggregated to determine whether they violated lending limits. *Id.* at 577. The court upheld imposition of a penalty based on negligence based on the absence of language in the statute requiring willfulness. *Id.* at 576.

More recently, the United States Court of Appeals for the Seventh Circuit examined the FIRA and took a different view. In *Larimore v. Comptroller of the Currency*,[191] this court rejected arguments that the FIRA gave regulators such authority.[192] The *Larimore* court concluded that an action to affix personal liability on a director must be brought under 12 U.S.C. § 93.[193] The reasoning in *Larimore* is perhaps more compelling than that applied in *del Junco*. The *Larimore* court dealt extensively with the legislative history of the FIRA.[194] The *del Junco* court, on the other hand, simply accepted the language of the act, which authorized the Comptroller to "take affirmative action to correct conditions resulting from any such violation or practice"[195] as sufficient to authorize the action.[196]

The most serious difference between *Larimore* and *del Junco* appears to be whether a regulator, not acting as a receiver or assignee, may seek indemnity from non-directors. Aside from the right of action found in the FIRA by the *del Junco* court, there appears to be no basis for a suit against these parties unless the regulator is acting in place of the lender via receivership or assignment. Additionally, a right of action under the FIRA could be construed to require only the negligence of an individual.[197] Finally, if the right of indemnity is read into the statute, an individual may be held personally liable for losses and forced to pay a civil penalty.[198]

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[189] Nicholas, *supra* note 61, at 157.

[190] 12 U.S.C. § 93(a) (1982) applies only to directors and 12 U.S.C. § 503 (1982) applies both to officers and directors. *See supra* notes 185-86 and accompanying text.

[191] 789 F.2d 1244 (7th Cir. 1986) (en banc). In *Larimore* the Comptroller of the Currency assessed personal liability upon directors of a national bank for loans in excess of statutory limits. *Id.* at 1247. The liability exceeded $ 1.8 million. *Id.*

[192] *Id.* at 1251-52. The court left open the possibility of implying power of the Comptroller to pursue indemnification in the context of unjust enrichment. *Id.* at 1254.

[193] *Id.* at 1253. The Federal Reserve has similar authority under 12 U.S.C. 503 (1982).

[194] *See Larimore*, 789 F.2d at 1248-51 (providing history of FIRA).

[195] 12 U.S.C. § 1818(b)(1) (1982).

[196] *del Junco*, 682 F.2d at 1342.

The Eighth Circuit accepted a broad view of the Comptroller's authority in First Nat'l Bank of Eden v. Dept. of Treasury, 568 F.2d 610 (8th Cir. 1978). In that case, the court upheld an order by the Comptroller that required two officers of a bank to reimburse $61,000 in bonus paid to them. *Id.* at 611.

[197] *See* Fitzpatrick v. FDIC, 765 F.2d 569, 576 (6th Cir. 1985)(permitting civil penalty under FIRA based on negligence).

Even under the reasoning of *Larimore*, the Comptroller is not without a remedy against a director. The action, however, must be brought in a United States District Court under the National Bank Act [199] under 12 U.S.C. § 93 (1982),[200] so that directors will be "adjudged personally liable only after receiving all the constitutional and legal protections accorded every citizen . . . ." [201] Further, the United States Supreme Court has determined that the "knowing violation"[202] requirement for liability under 12 U.S.C. § 93(a) is not satisfied by mere negligence.[203] But the Court found that failure to investigate in the face of a duty to do so meets the scienter requirement.[204] Thus, the Court has stated that a "director of a national bank is presumed to know its true condition. . . ." [205]

Provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO)[206] have been used by banks against accountants, corporate borrowers for fraudulently inducing loans, and against borrowers for concealing assets in bankruptcy proceedings. [207]As an assignee or receiver, a regulator could certainly pursue these same claims. In addition, regulators have brought RICO actions against bank officers.[208] Although the intricacies of civil RICO litigation are beyond the scope of this comment, certain provisions of the legislation should be noted. Because RICO provisions require only that the predicate acts of racketeering occur within ten years of each other, claims may be pursued that would otherwise be barred by the statute of limitations.[209] The statute affords wide procedural and evidentiary advantages to the plaintiff.[210] Finally, RICO provides for recovery of triple damages plus attorney fees.[211] With the trend of expanding liability, information is the director's most effective defense. A new director must thoroughly apprise himself of the institution, its board of directors, and how its committees are organized.[212] He should further consider obtaining biographical information on other directors and management.[213] Finally, a new director should review correspondence between the institution and regulators and auditors during recent years.[214]

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[198] *See* Nicholas, *supra* note 61 at 161 n. 54 (president of bank agreed to pay $153,753 in restitution and $100,000 in penalties).

[199] 12 U.S.C. § 24 (1982). The act applies to nationally chartered banks. The Federal Reserve Act applies to state-chartered member banks and has liability provisions that apply to all national bank directors and officers. 12 U.S.C. § 221-552 (1982). The Federal Deposit Insurance Act imposes liability on directors of state-chartered, federally insured banks who are not members of the Federal Reserve. 12 U.S.C. § 1811-1832 (1982).

[200] *See supra* note 183 (text of act).

[201] *Larimore*, 789 F.2d at 1255.

[202] The Act requires "knowing" violation of banking laws. *See supra* note 183.

[203] Yates v. Jones Nat'l Bank, 206 U.S. 158 (1906); Corsicana Nat'l Bank v. Johnson, 251 U.S. 68, 71-72 (1919).

[204] *Yates*, 206 U.S. at 159. In *del Junco* the Ninth Circuit applied this standard and found that the directors were liable. *del Junco*, 682 F.2d at 1342.

[205] *Yates*, 206 U.S. at 168.

[206] Enacted at title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 84 Stat. 941 (1970) (codified at 18 U.S.C. § § 1961-1968 (1983)).

Numerous states have enacted statutes modeled on RICO which also provide for a private cause of action by injured parties. Kauffman & Levin, *Civil RICO Litigation Involving Banks: The Developing Case Law*, 9 DEL. J. CORP. L. 1, 6 n. 26 (1984).

[207] Kauffman & Levin, *supra* note 206, at 29.

[208] *See* FDIC v. Hardin, 608 F. Supp. 348 (E.D. Tenn. 1985)(suit against president and director of failed bank).

E. Liability of Collateral Participants

Although this comment has focused on the liability of officers and directors, and how certain types of actions are limited by statute to directors,[215] it should not be assumed that the FSLIC and the FDIC have no interest in recovering from other parties who may have played some part in the failure of the institution. Attorneys, accountants, and appraisers are all logical objects of agency attention when efforts are made to recoup losses.

Even prestigious law firms have been subject to suits as a result of lender insolvency.[216] The actions have been based on negligence,

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[209] *See* Bache Halsey Stuart Shields, Inc. v. Tracy Collins Bank and Trust Co., 558 F. Supp. 1042, 1046 (D. Utah 1983) (although action under Securities Exchange Act barred by three year statute of limitations, actionable under RICO for ten years).

[210] Kauffman & Levin, *supra* note 206, at 5. The act provides broad venue provisions and broad subpoena powers to compel attendance of witnesses. *Id.*

[211] *Id.* at 6.

[212] Deal, *Liability of Bank Directors*, 39 Bus. Law. 1033, 1035 (1984).

[213] *Id.* at 1036.

[214] *Id.*

[215] Only directors can be sued under the National Banking Act. *See supra* note 183 (text of act).

[216] The law firm of Blank, Rome, Comisky & McCauley, along with two partners, was named in a suit by the FSLIC seeking $250 million in damages resulting from the failure of Sunrise Savings and Loan in Florida. Galen, *Civil Suits Still Question Pa. Firm's Role in S & L Collapse*, 9 Nat'l L. J. 11, 11 (Mar. 16, 1987). An earlier suit had been filed by shareholders of the savings and loan against the law firm. Love, *Phila. Firm, Partners Sued in S & L Failure*, 7 Nat'l L. J. 3, 3 (Aug. 26, 1985). The suit alleged that the law firm had collected $4.7 million in closing fees from the saving and loan's borrowers and $400,000 in fees from the association itself. *Id.* at 12.

A special counsel has recommended that the prestigious Baltimore firm of Venable, Baetjer and Howard, which includes former Carter administration Attorney General, breach of fiduciary duty, and conflict of interest.[217] In addition, other suits have alleged violations of the federal Racketeer Influenced and Corrupt Organizations Act (RICO).[218]

Accountants and appraisers have similarly been sued under a variety of legal theories. Claims of negligent misrepresentation, fraudulent misrepresentation, RICO violations, securities violations, and interestingly, aiding and abetting fraudulent misrepresentation were raised in *First Federal Savings & Loan Assn. of Pittsburg v. Oppenheim, Appel, Dixon & Co.*[219] Claims of negligence, malpractice, and breach of common law duties have also been alleged.[220] Courts have applied state law, and not federal common law, to the misrepresentation theories, even when a federal agency was a party.[221] This represents a departure from the approach of some courts who apply federal common law in some actions involving the FSLIC or FDIC.[222] The prospect of the FSLIC initiating an action against an accounting firm or appraisers who have provided reports which induced a failed lender to make improvident loans is very real. Courts have, however, shown reluctance to extend liability to noncontractual parties. Specifically, courts have declined to permit noncontractual parties to recover for negligent misrepresentation by accountants without some conduct by the defendants linking them to the third party sufficient to show that the accountant understood the party's reliance.[223] Knowledge that the noncontractual

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Benjamin Civiletti, be sued in connection with the collapse of savings and loans in that state. Effron, *Md. Firm Faces Suit Over S & L Crisis Role*, 8 NAT'L L. J. 3,3 (May 19, 1986).

[217] Galen, *supra* note 216, at 11.

[218] Effron, *supra* note 216, at 11. The suit to which Effron refers was not brought by a regulator, but as a class action. *Id.* A lender may assert civil RICO claims. *See* Kauffman & Levin, *supra* note 206, at 2 (when bank has been injured RICO may provide remedy).

[219] 629 F. Supp. 427, 433 (S.D.N.Y. 1986). The FSLIC, as successor in interest of a savings and loan, was one of the plaintiffs in this suit. *Id.* at 431. The suit arose when a dealer in government securities pledged plaintiffs' securities as collateral for loans. *Id.* at 432. The loans were foreclosed and the securities were liquidated. *Id.* The defendant was an accounting firm who had audited the dealer. *Id.*

[220] FDIC v. Jennings, 615 F. Supp. 465, 467 (W.D. Okla. 1985), *aff'd*, 816 F.2d 1488 (10th Cir. 1987). As part of this action the FDIC, as receiver of Penn Square Bank, sued Peat, Marwick, Mitchell & Co. The suit was subsequently settled as to some defendants. *Peat Marwick, FDIC Settle Lawsuits Over Handling of Penn Square Audit*, 47 Wash. Fin. Rep. (BNA) 96 (July 21, 1986).

[221] *See First Fed. Sav. & Loan*, 629 F. Supp. at 434-35 (determined that either California or New York law applied).

[222] *See supra* notes 55-60 and accompanying text.

[223] Credit Alliance Corp. v. Arthur Andersen & Co., 65 N.Y.2d 536, 551, 493

party was shown a report in order to induce reliance upon it has been held insufficient in the absence of knowledge of the specific purpose of the report or some action by the accountant directed toward the noncontractual party.[224] The information provided by an appraiser is analogous to that provided by an accountant, thus it may be argued that the same standard of duty should also apply to them. Under this reasoning, unless an accountant or appraiser prepares a report with the knowledge that one specific purpose is to induce a loan, or the accountant or appraiser in some way makes contact with the lender,[225] no liability will be found. Accountants and appraisers would best avoid liability to a lender by never sending a report or appraisal directly to a lender, if they are employed by a potential borrower.

F. Defenses

Directors and officers often assert the "business judgment rule" as a defense against any action for negligence. In addition, in a few instances, defendants have asserted the affirmative defense of contributory negligence on the part of the regulator.[226] These attempts have fallen short on two bases. First, courts recognize that the regulators/insurers act in two entirely separate capacities.[227] In asserting a claim held by the lender against an individual, the agency may be acting as a receiver, conservator, or assignee.[228] When the agency acts as insurer, it acts in its corporate capacity.[229] Because of the two entity concept, no counterclaim or affirmative defense arising out of the acts of the agency in a corporate capacity may be asserted against the agency as a receiver, conservator, or assignee.[230] This effectively thwarts any asser-

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N.Y.S.2d 435,443, 483 N.E.2d 110, 118 (1985), *order amended,* 66 N.Y.2d 812, 498 N.Y.S.2d 362, 489 N.E.2d 249 (1985).

[224] *Credit Alliance*, 65 N.Y.2d at 553-54, 493 N.Y.S.2d at 444, 483 N.E.2d at 119.

[225] The act of sending a copy of an audit report to a lender has been found sufficient direct conduct to create liability. First Fed. Sav. & Loan Assn. of Pittsburg v. Oppenheim, Appel, Dixon & Co., 629 F. Supp. 427, 434 (S.D.N.Y. 1986).

[226] *E.g.*, FDIC v. Dempster, 637 F. Supp. 362, 364 (E.D. Tenn. 1986) (officers and directors of bank claim contributory negligence of FDIC).

[227] Gunter v. Hutcheson, 674 F.2d 862, 873 (11th Cir.), *cert. denied*, 459 U.S. 826 (1982) ; Gilman v. FDIC, 660 F.2d 688, 694 (6th Cir. 1981); FDIC v. Godshall, 558 F.2d 220, 222 (4th Cir. 1977); Gross v. FDIC, 613 F. Supp. 79, 81-82 (D. Kan, 1985).

[228] *FDIC v. Dempster*, 637 F. Supp. at 365. In *Dempster*, various officers and directors being sued by the FDIC as receiver asserted the affirmative defense of contributory negligence. *Id.* at 364. The court held that because the defense involved actions prior to the assignment to the FDIC/Corporation, they could not be asserted. *Id.* at 366.

[229] *Id.* at 365.

[230] *Id.*

tion of contributory negligence for failure to act reasonably to discover and correct problems in the troubled institution. Secondly, the courts have been reluctant to find that the agency has any duty toward any of these persons who choose to assert counterclaims.[231] The courts have been consistent in finding that the agency has no duty to the lender or others to discover, or even to reveal, problems in the regulated institution.[232] There are some cases, however, that suggest that such a duty could arise where the agency intervenes to the extent that it assumes a duty.[233] Creative officer defendants have also asserted that the lender itself was contributorily negligent in an attempt to bar actions by the receiver against them.[234] Contributory negligence of this sort has been held to be legally impossible.[235]

VII. CONCLUSION

Aggressive pursuit of claims by the FDIC and FSLIC has made working for a bank or savings and loan more dangerous than ever. Officers and directors may expect to be sued, if an agency is forced to intervene to protect deposits. The agency will have considerably greater power to pursue any claim to which the lender was entitled. The action may, with very few exceptions, be brought in federal court if the agency so desires. The statute of limitations will be much longer than that to which the lender would have been entitled. The agency may be able to pursue punative damages against the estate of a tortfeasor, if state law allows. Any counterclaim or assertion of contributory negligence against the agency may be easily side-stepped by simply assigning the chose-in-action from its receiver entity to its corporate entity. Finally, the agency may have the power to unilaterally assess personal liability against virtually anyone involved with a lender without the necessity of a civil suit.

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[231] *E.g.*, First State Bank of Hudson Co. v. United States, 599 F.2d 558, 562-63 (3d Cir. 1979) (duty is to maintain integrity of deposit insurance fund), *cert. denied*, 444 U.S. 1013 (1980); *FDIC v. Dempster*, 637 F. Supp. at 367 (duty to discover misconduct is on officers and directors, not on FDIC).

[232] *See* Emch v. United States, 630 F.2d 523, 525 (7th Cir. 1979) (no duty to accountants), *cert. denied*, 450 U.S. 966 (1981); FDIC v. Jennings, 615 F. Supp. 465, 469 (W.D. Okla 1985) (same), *aff'd*, 816 F2d 1488 (10th Cir. 1987); *FSLIC v. Williams*, 599 F. Supp. at 1204 (no tort duty to advise or assist member associations); FDIC v. American Bank Trust Shares, 460 F. Supp. 549, 555 (D.S.C. 1978) (FDIC has no duty to disclose adverse information uncovered during examination), *aff'd*, 629 F.2d 951 (4th Cir. 1980); Davis v. FDIC, 369 F. Supp. 277, 280 (D. Colo. 1974) (no duty to general public).

[233] *See FSLIC v. Williams*, 599 F. Supp. at 1199 (action for negligence could lie where negligence is in extra-statutorial duty); *Emch*, 474 F. Supp. at 102 (same); *In re* Franklin Nat'l Bank Sec. Litig., 445 F. Supp. 723, 733 (E.D.N.Y.) (if activities so extensive that officers and directors reasonably relied, then liability could result because of assumption of duty), *supplemented by*, 449 F. Supp. 574 (E.D.N.Y. 1978).

[234] *E.g.*, FSLIC v. Huff, 237 Kan. 873, 704 P.2d 372, 377 (1985)(claims of contributory negligence in attempts to recover losses).

[235] *Id.*

These advantages afforded regulators may exceed the original intent of Congress. However, given the current precarious finacial situation of the federal insurers, there is little reason to expect that Congress will act to reduce these extraordinary advantages afforded by court interpretations.

Danny Clearman

WETLAND LITIGATION IN THE GULF COAST STATES

I. Introduction

Public awareness of environmental concerns has given rise to a substantial body of statutes and caselaw since the late 1960s. Within this area of litigation a significant category of wetlands law has emerged. This paper is an attempt to analyze those cases originating in the Gulf Coast states (Florida, Alabama, Mississippi, Louisiana, and Texas), so as to give some picture of this region's approach to wetlands protection issues.

First, it must be noted that wetlands make up an important element of this nation's ecological balance, as well as providing substantial economic remuneration.[1] These benefits include:

Wildlife habitats - these areas provide food and shelter for a variety of waterfowl, fur-bearing animals, fish and other wildlife. About one-third of the nation's threatened or endangered species exist within wetland areas.[2]

Flood control - able to hold flood waters and slow water flow, these areas reduce downstream losses of property and life.[3]

Intrusion control and water purification - wetlands reduce silt and filter out many pollutants before they can reach main waterways. Additionally, groundwater pressure, created by the freshwater flow through wetlands, prevents saltwater from entering water supplies.[4]

Economic benefits - approximately two-thirds of the nation's shellfish, sport fish and commercial fish utilize coastal wetlands for spawning and nursery grounds, while inland wetlands support other commercial sport fish habitat.[5] Timber production in bottomland forests is a highly profitable enterprise, while marshes provide breeding grounds for many commercially sought after fur producing animals.[6]

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[1] A. Wentz, Wetlands Values and Management 15 (1981).

[2] *Hearings on S. 777 (Clean Water Act Amendments) Before Subcomm. on Environmental Pollution of the Senate Comm. on Environmental and Public Works*, 97th Cong., 2d Sess. 4 (1982); 33 C.F.R. § 320.4(b)(2)(i) (1986).

[3] 33 C.F.R. § 320.4(b)(2)(iv) & (v) (1986).

[4] 33 C.F.R. § 320.4(b)(2)(vii) (1986).

[5] Bass, catfish, pike, bluegill, sunfish and crappie are some of the fish which exist within inland wetlands. Dept. of the Interior, U.S. Fish & Wildlife Service, *America's Endangered Wetlands* 2 (1984).

[6] *Id.* Louisiana marshes alone provide an annual fur harvest valued between 10 and

Despite their vitally important functions, these areas are being destroyed or altered at an alarming rate.[7] For example, nearly eighty percent of the twenty-five million acres of bottomland, hardwood forest wetlands that once existed in the lower Mississippi Valley, have been converted to agricultural use.[8] Due to the pressures of an evergrowing civilization with its need for housing, sanitation, food and recreational facilities, attempts to stem the destruction of wetlands have met with stiff opposition from private developers and local governments who view such areas as wasted space or worse.[9] In an effort to inform other agencies, states and the general public, the federal government, through the Corps of Engineers,[10] has defined what lands may constitute "wetlands".[11] "Wetlands" in these contexts is a jurisdictional term for purposes of the legislative process and, though the definition is based on scientific factors such as soil, hydrology and vegetation, it is somewhat at odds with the accepted scientific definition of wetlands.[12] There is general agreement though, as to the major wetland types, which include ponds or lakes, marshes, swamps, peat bogs and estua-

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15 million dollars. *Id.*

[7] It has been estimated that 200-300 thousand acres of U.S. wetlands are destroyed each year. WETLANDS VALUES AND MANAGEMENT, *supra* note 1, at 1.

[8] *America's Endangered Wetlands*, *supra* note 5, at 4.

[9] In the 19th century, one marshland was described as "[e]ither a gloomy waste of water or still more hideous expanse of reeds and other aquatic plants, impassable by human foot, and involved in an atmosphere pregnant with pestilence and death." J. COLES, THE ARCHEOLOGY OF WETLANDS 3 (1984)(quoting R. WARNER, A HISTORY OF THE ABBEY OF GLASTON AND OF THE TOWN OF GLASTONBURY (1826)).

[10] The Corps of Engineers was initially delegated the duty of waterway protection with the enactment of the Rivers and Harbors Act of 1899. Act of May 3, 1899. Rivers and Harbors Act, ch. 425, 30 Stat. 1121 (1899) (codified as amended at 33 U.S.C. §§ 401-413 (Supp. 1986)). The Corps' authority is ironic when one considers the responsibilities of the Corps for building structures potentially affecting the environment. Power, *The Fox in the Chicken Coop: The Regulatory Program of the United States Army Corps of Engineers*, 63 VA. L. REV. 503, 505-06 (1977).

[11] 33 C.F.R. § 323.2(c) (1986). This regulation includes marshes, shallow swamps, and similar areas that are contiguous or adjacent to other navigable waters and that support freshwater vegetation as freshwater wetlands. Freshwater wetlands are described as those that are (1) periodically inundated and that (2) are normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction. *Id.* Further, the term "wetland" means "those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support and that under normal circumstances do support a prevalence of vegetation typically adapted for life in saturated soil conditions." *Id.* § 323.2.

[12] The scientific community generally defines a wetland as "[A]ny area of land covered by water for part of each year, or of each day, or which has been drowned by water at any time in its existence." COLES, *supra* note 9, at 1.

ries.[13] Despite the definitions however, the precise meaning of the term wetlands is still widely litigated.[14] Principal of these recent cases is *Avoyelles Sportsmen's League, Inc. v. Marsh.*[15] The Corps of Engineers' interpretation of its jurisdiction was upheld by the Fifth Circuit. The court found the factors to consider in wetlands classifications were soil type, vegetation and degree and frequency of inundation.[16] Corps jurisdiction was held not to be limited to those lands supporting species *requiring* constant saturation, but also included those plants which would *tolerate* such conditions.[17] Further clarification was added with *United States v. Carter*,[18] which held the growth of transitional vegetation did not automatically remove an area from wetlands classification.[19]

Prior to further consideration of cases utilizing these definitions, it is appropriate to present the statutory background with respect to Federal wetlands protection.

II. Background

A. *The Rivers and Harbors Act of 1899*

The Supreme Court first announced the federal government's authority over certain waters of the United States in the case of *Gibbons v. Ogden*[20] by virtue of a constitutionally granted power to regulate commerce.[21] Coupled with the establishment of federal rights was the legislative power to enact statutes to protect those rights. The extent of such legislation was initially confronted in the admiralty case of *The Daniel Ball.*[22] In this case, the Court concluded that only navigable waters were subject to the Commerce Clause[23] and defined "navigable waters" as being those "used or susceptible to being used . . . as highways for commerce . . . ."[24] Litigation over the "navigable waters" definition continued[25] and Congress sought to clarify federal authority through its promulgation of the Rivers and Harbors Act of 1899 (RHA).[26] Through this Act, Congress claimed jurisdiction over specified actions potentially affecting the navigability of the nation's waterways.[27] Of primary importance were sections 9,[28] 10[29] and 13.[30] Section 9 required specific congressional consent prior to the construction of bridges, dams, causeways and levees obstructing navigable waterways. Section 10 flatly prohibited any unauthorized obstruction or alteration of any navigable water of the United States unless a permit was issued by the Department of the Army. Section 13, also known as the Refuse Act, forbade discharge of refuse into navigable waters or their tributaries without a permit from federal authorities.[31]

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[13] *Id. See* 33 C.F.R. § 323.2(c) (1986). *See also* B. Holmes, *Federal Participation in Land Use Decisionmaking of the Waters Edge - Floodplains and Wetlands*, 13 Nat. Resources Law. 351, 382 (1980) [hereinafter *Federal Participation*] (definition of wetlands and types of lands included).

[14] Want, *Federal Wetlands Law: The Cases and the Problems*, 8 Harv. Envtl. L. Rev. 1, 3 n.17 (1984).

[15] 715 F.2d 897 (5th Cir. 1983), *vacated and remanded*, 786 F.2d 631 (5th Cir. 1986).

[16] Inundation must be intermittent or temporary in order to come within the Corps' jurisdiction. *See* United States v. Fleming Plantations, 12 Env't Rep. Cas. (BNA) 1705 (E.D. La. 1978) (inundation by rainfall satisfied wetlands definition).

[17] *Avoyelles*, 715 F.2d at 911.

[18] 18 Env't Rep. Cas. (BNA) 1804 (S.D. Fla. 1982).

[19] *Id.* at 1808.

[20] 22 U.S. (9 Wheat) 1 (1824).

[21] U.S. Const. art. 1, § 8, cl. 3.

[22] 77 U.S. (10 Wall.) 557 (1870).

It is, however, the section 10 permit requirement[32] which has served as the primary jurisdictional basis under the RHA for wetlands protection.[33] This statute is limited in two major respects. First, its application is restricted to "navigable waters."[34] Second, the activities contemplated must constitute "excavation, fills or alteration" of such water bodies.[35] Presently, the court's test for navigability requires that the body of water must have been or must be able to be used in commerce.[36] With such limitations, many acres of wetlands are not protected against development and destruction because most wetlands are not in fact navigable. Dissatisfaction with this lack of protection in part led to the enactment of the 1972 Federal Water Pollution Control Act Amendment with its much wider scope of coverage.[37]

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[23] *Id.* at 563.

[24] *Id.*

[25] *See* Cardwell v. American Bridge Co., 113 U.S. 205, 211 (1885)(navigable waters intrastate not navigable water of U.S.; considered navigable water of state); Escanabe Co. v. Chicago, 107 U.S. 678, 683 (1882) (same); The Montello, 87 U.S. (20 Wall.) 430, 443 (1874) (navigable waters include waterways with potential for use in interstate commerce); Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713, 725 (1865) (jurisdictional powers include keeping waterways free from obstruction in order to remain navigable).

[26] Rivers and Harbors Act of 1899, *supra* note 10.

[27] H.E. Seltzer & R. Steinberg, *Wetlands and Private Development*, 12 COLUM. J. ENVTL. L. 159, 161 (1987).

[28] 33 U.S.C. § 401 (1982).

[29] 33 U.S.C. § 403 (1982).

[30] 33 U.S.C. § 407 (1982).

[31] The inclusion of tributaries was designed to prevent diversion of those waters which would affect commerce. *See* United States v. Rio Grande Dam and Irrigation Co., 174 U.S. 690, 710 (1899) (injunction granted to prevent diversion of tributary waters).

[32] Section 10 permits are of four types:

> (1) Nationwide: These permits apply automatically to certain common types of de minimis acts provided they do not interfere with navigation. 33 C.F.R. §§ 322.2(y) and 325.5(e) (1982).
>
> (2) Individual: Must have public notice and hearing, and are subject to the Corps' determination of public interest concerns. 33 C.F.R. §§ 325.3 and 325.3(e) (1982).
>
> (3) Letters of Permission: Where the Corps determines that the act is minor and without significant impact, no public notice or hearing is required though consultation with other federal agencies may be needed. 33 C.F.R. §§ 322.2(d) and 325.5(b) (1982).
>
> (4) General: Apply to categories of similar projects, where one has been approved after public notice and hearing. 33 C.F.R. §§ 322.2(f) and 325.5(e)

(1982).

[33] Section 10 of the RHA reads:

§ 403 OBSTRUCTION OF NAVIGABLE WATERS GENERALLY; WHARVES; PIERS, ETC.; EXCAVATIONS AND FILLING IN

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United Sates, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

33 U.S.C. § 403 (1986).

[34] Seltzer & Steinberg, *supra* note 27, at 162. "Navigable waters . . . are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past or may be susceptible for use to transport interstate or foreign commerce." 33 C.F.R. § 329.4 (1982). Jurisdiction of the Corps reaches laterally to the mean high water mark (MHW) in tidal areas, 33 C.F.R. § 322.2(a) (1982), and the ordinary high water mark with respect to freshwater areas. 33 C.F.R. § 329.11(a) (1982). For a more detailed explanation of these terms and data necessary to establish these criteria, see 33 C.F.R. § 329.11(a)(1) and .12(a)(2). *See also* Want, *supra* note 14, at 7 (discussion of criteria).

[35] 33 U.S.C. § 1344(a) (1987).

[36] Want, *supra* note 14, at 6.

[37] 33 U.S.C. §§ 1251-1376 (Supp. II 1972). *See generally*, The Clean Water Act Amendments of 1987, 18 Env't Rep. (BNA) 2 (1987) (background of act).

B. *The Federal Water Pollution Control Act*

The Federal Water Pollution Control Act (FWPCA) was initially promulgated in 1948[38] and placed primary importance on state development of pollution control measures. The 1948 law contained no federal requirements regarding water pollution and its stated policy was merely to "recognize, preserve and protect the primary responsibilities and rights of the state in controlling" such pollution.[39] The Act was amended several times in an attempt to cope with the growing national problems of water pollution.[40] In 1972, through amendments to the FWPCA, Congress essentially rewrote this area of the law[41] by placing the federal government in a position of supervising and coordinating control strategies.[42] Section 404 of the FWPCA requires a permit whenever discharges of fill material occur in United States waters.[43] Prior to the FWPCA, the Corps' protection of wetlands was constrained under the RHA to "navigable waters".[44] Even after passage of the amendments of 1972, the Corps continued to define its permit jurisdiction as being restricted to navigable waters.[45] Not until the case of *Natural Resources Defense Council, Inc. v. Callaway*,[46] did a more expansive reading of "navigable water" become accepted as being in keeping with the purposes of the FWPCA.[47] The United States District Court for the District of Columbia ordered the Corps to rescind those regulations which limited its jurisdiction and instructed it to create alternative regulations. Each of these offered an alternative definition of "navigable waters" so as to include wetlands within the Corps permit jurisdiction.[48] In 1977, further amendments to section 404 (commonly referred to as the Clean Water Act (CWA))[49] clarified exemptions and provided a mechanism for states to assume responsibility for protection of water quality.[50] As it now stands, section 404 jurisdiction extends to "waters of the United States",[51] broadening the geographic limits considerably farther than under the RHA. However, there are exceptions[52] and limitations to section 404 not present under the RHA. Due to the CWA's restriction to "point sources"[53] and to discharges of

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[38] Federal Water Pollution Control Act, ch. 758, 62 Stat. 1155 (codified at 33 U.S.C. §§ 1151-1175 (1948)).

[39] 33 U.S.C. § 1151 (1948). *See* The Clean Water Act Amendments of 1987, *supra* note 37, at 2 (history of federal water pollution control).

[40] The Federal Water Pollution Control Amendments of 1972, 33 U.S.C. §§ 1251-1376 (Supp. II 1972).

[41] Comment, *The Taking of Wetlands Under Section 404 of the Clean Water Act*, 17 ENVTL. L. 111, 113 (1986).

[42] The Senate Committee on Public Works found that water pollution control programs had been inadequate "in every vital aspect". S. REP. NO. 414, 92d Cong., 2d Sess. 5, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 3668, 3674.

[43] 33 U.S.C. § 1344 (1987).

[44] 33 U.S.C. §§ 401-413 (Supp. IV 1986).

[45] Comment, *supra* note 41, at 113.

[46] 392 F. Supp. 685 (D.D.C. 1975).

[47] 40 Fed. Reg. 31320 (1975).

[48] *NRDC v. Callaway*, 392 F. Supp. at 686.

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[49] The Clean Water Act of 1977, Pub. L. No. 95-217, § 67(a), (b), 91 Stat. 1600 (1977) (codified as amended at 33 U.S.C. § 1344(a)-(t) (1987)).

[50] 33 U.S.C. § 1344(g) (Supp. I 1977). For a comprehensive discussion and analysis of these issues see Thompson, *Section 404 of the FWPCAA of 1977: Hydrologic Modification, Wetlands Protection and the Physical Integrity of the Nation's Waters*, 2 Harv. Envtl. L. Rev. 264, 275-85 (1978).

[51] 33 U.S.C. § 1362(7) (1987).

[52] These exceptions are:

> (f)(1) Except as provided in paragraph (2) of this subsection, the discharge of dredge or fill material
>
> (A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;
>
> (B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, and bridge abutments or approaches, and transportation structure;
>
> (C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;
>
> (D) for the purpose of construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters;
>
> (E) for the purpose of construction or maintenance of farm roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized;
>
> (F) resulting from any activity with respect to which a State has an approved program under section 208(b)(4) which meets the requirements of subparagraphs (B) and (C) of such section, is not prohibited by or otherwise subject to regulation under this section or section 301(a) or 402 of this Act (except for effluent standards or prohibitions under section 307).

33 U.S.C. § 1344(f)(1)(A) - (F) (1987).

[53] Section 1362 states:

> The term 'point source' means any discernable, confined and discrete conveyance, including, but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and

dredged or fill material,[54] section 404 covers fewer activities than section 10 of the RHA. So activities such as dredging, although clearly within section 10 jurisdiction, may not be within section 404 jurisdiction if a "point source" is not involved or if there is no discernable "discharge".[55] Nonetheless, the Supreme Court has stated that the Corps regulations extend to all wetlands adjacent to navigable or interstate waterways along with their tributaries.[56] Other significant restrictions upon the Corps of Engineers' decisions regarding permits can further be restricted through the veto power of the Environmental Protection Agency (EPA)[57] and the citizen suit provision for enforcement of the limitations of the CWA.[58]

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return flows from irrigated agriculture.
33 U.S.C. § 1362(14) (Supp. 1988).

[54] 33 U.S.C. § 1311 (1987).

[55] Section 404 jurisdiction would depend upon a "discharge" of fill material. 33 U.S.C. § 1344(a) (1987). Problems as to jurisdiction arise when dredging is done without discharging in water covered by § 404. Whether § 404 covers the dredging becomes crucial. The Fifth Circuit has implied that § 404 would be applicable in such an instance. *See* Weiszmann v. District Engineer, 526 F.2d 1302, 1306 (5th Cir. 1976) (Section 10 case- "sediment" described as discharged pollutant). *See also* J. Jackson, *The Constitutional Test for Wetlands Jurisdiction: Agencies in a Muddle*, 9 NATIONAL WETLANDS NEWSL. 7, (1987) (still no clear ideas of what wetlands are covered).

[56] 33 C.F.R. § 323.2 (1986). *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 129, 106 S. Ct. 455, 460 (1985) (Corps regulations "clearly" extended authority beyond mere navigability).

[57] 33 U.S.C. § 1344(c) (1987). The EPA is ultimately responsible for the attainment of the goals of the CWA. *Id.*

[58] Section 1365 reads in pertinent part:

> . . . any citizen may commence a civil action on his own behalf —
> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this act which is not discretionary with the Administrator.
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 309(d) of this Act.
> (b) No action may be commenced —
> (1) under subsection (a)(1) of this section —
> (A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

Evaluations must be made of a proposed project permit application in light of general policies outlined by Corps' regulations.[59] Most

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(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 306 and 307(a) of this Act. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation. (c)(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(3) Whenever any action is brought under this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General and the Administrator. No consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator.

(d) The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

33 U.S.C. § 1365 (a)-(e) (1987).

[59] 33 C.F.R. § 320.4 (1987). These general policies include:

A. Public interest review;
B. Effect on wetlands;
C. Fish and Wildlife;
D. Water quality;
E. Historic, cultural, scenic and recreational values;
F. Effect on limits of the territorial seas;
G. Property ownership considerations;
H. Affected coastal zones;
I. Marine sanctuaries;
J. Other governmental requirements;
K. Safety;
L. Floodplain management;

potent of these policy considerations is the "public interest review",[60] in that an applicant may qualify for a permit under all other considerations, yet be denied a permit based upon a Corps' determination that the project is contrary to the public interest.[61] A balancing of interests takes place and the proposed project's benefits must outweigh reasonably foreseeable detriment.[62] Another requirement of particular importance is that of consultation with the Fish and Wildlife Service and with the National Marine Fisheries. The views expressed by these federal agencies are to be given full consideration in permit decisions.[63] Also, where a certificate of authority for proposed work has been denied by the state, local or federal government, the Corps may not issue a permit.[64]

Both the RHA and the CWA concern themselves with the issuance of permits after consideration of a project's advantages and possible adverse effects, but where a permit is issued or the Corps itself undertakes an activity which may impact upon the wetlands environment, another statute must be considered: The National Environmental Policy Act of 1964[65] (NEPA).

C. *The National Environment Policy Act*

Section 102(2)(C) of The National Environmental Policy Act

M. Water supply and conservation;
N. Energy conservation and development;
O. Navigation.

Id. at § 320.4(a)-(o).

[60] Comment, *supra* note 41, at 115.

[61] *Id.* at 115-16.

[62] 33 C.F.R. § 320.4(a)(2) (1987). This regulation outlines the criteria for a cost/benefit analysis and reads in pertinent part:

> (i) The relative extent of the public and private need for the proposed structure of work: [sic] (ii) Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work; and
> (iii) The extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work may have on the public and private uses to which the area is suited.

Id.

[63] 33 C.F.R. § 320.4(c) (1987).

[64] 33 C.F.R. § 320.4 (j)(1) (1987).

[65] National Environmental Policy Act, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§ 4321-4347 (1969)). NEPA's stated purpose is "to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony . . ." *Id.* at § 4331.

(NEPA) requires an environmental impact statement[66] (EIS) be created whenever there exists a proposal for a major federal project[67] which will have a significant[68] impact upon the quality of the human

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[66] *Id.* at § 4332(2)(c). The EIS is to consider:

> (a) The environmental impact of the proposed action;
>
> (b) any adverse environmental effects which cannot be avoided should the proposal be implemented;
>
> (c) alternatives to the proposed action;
>
> (d) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long term productivity; and
>
> (e) any irreversible and irretrievable commitments of resources which would be involved if the proposal should be implemented.

Id. at § 4332(2)(C)(i)-(v).

Further, the federal agency making the proposal is required to consult and obtain comments of other federal agencies which may have jurisdiction or expertise with respect to any of the possible impacts. *Id.* at § 4332(2)(C)(v).

[67] Major federal project is defined as including:

> (a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals . . . .
>
> (b) Federal Actions tend to fall within one of the following categories:
>
> > (1) Adoption of official policy, such as rules, regulations and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. § 551; treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.
> >
> > (2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of federal resources, upon which future agency actions will be based.
> >
> > (3) Adoption of programs such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.
> >
> > (4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

40 C.F.R. § 1508.18(a)-(b) (1987).

[68] "Significant" as defined by CEQ regulations requires consideration of both context and intensity:

> (a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.
>
> (b) Intensity. This refers to the severity of impact. Responsible officials must

environment.[69] Title II of NEPA created the Council on Environmental Quality (CEQ) whose duties include preparation of an annual report on environmental quality[70] and oversight of federal agency com-

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> bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:
>
> (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
>
> (2) The degree to which the proposed action affects public health or safety.
>
> (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
>
> (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
>
> (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
>
> (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration
>
> (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
>
> (8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.
>
> (9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
>
> (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

40 C.F.R. § 1508.27 (1987).

[69] 42 U.S.C. § 4332 (2)(E)(1969). "Quality of the human environment" is interpreted as:

> . . .comprehensively to include the natural and physical environment and the relationship of people with that environment. This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

40 C.F.R. § 1508.14 (1987).

[70] 42 U.S.C. §§ 4341, 4344(7) (1970).

pliance with NEPA.[71] The CEQ is also charged with the responsibility of creating guidelines for the implementation of the environmental impact statement process; these regulations are binding upon federal agencies.[72] The preparation of an EIS under section 102(2)(C) has been an effective tool for controlling wetlands destruction because of NEPA's implied adoption of wetlands protection.[73] Court decisions[74] in the early 1970s made clear that NEPA required avoidance or minimization of damage to wetlands.

Taken together, the RHA, CWA and NEPA provide the statutory basis for wetlands protection. To ensure compliance with these laws by federal agencies and private individuals, judicial review of agency determinations is available under the Administrative Procedure Act (APA).[75] Agency action in denying or issuing a permit under section 10 of the RHA or section 404 of the CWA is reviewed under the "arbitrary and capricious" standard by the courts, which gives the agency great deference in their field of expertise.[76]

Courts may also review the validity of a Corps wetlands determination in those cases where a developer is sued to enforce the determination or where the developer seeks to have the determination declared invalid.[77] Courts are somewhat reluctant to conduct a *de novo* review of these decisions and prefer to dispose of a case through analysis of the record and summary judgment.[78] Where testimony is admitted and expert opinion presented, the cost of litigation increases dramatically and further complicates already complex issues.[79]

Against this backdrop of statutes, regulations and judicial determinations, let us now turn to those cases arising out of wetlands controversies in the Gulf Coast States.

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[71] *Id.* at 4344(3).

[72] 40 C.F.R. §§ 1500-1508 (1987); *see also* Exec. Order 11,990, 3 C.F.R. 121 (1977) *reprinted in* Office of the Federal Register, National Archives & Records Admin., PRESIDENTIAL PROCLAMATIONS AND EXECUTIVE ORDERS 701 (1985) (ordering the issuance of binding federal regulations in an effort to promote uniformity and efficiency).

[73] Exec. Order No. 11,990 *supra* note 72. Holmes, *Federal Participation supra* note 13, at 403.

[74] *See, e.g.*, Montgomery v. Ellis, 364 F. Supp. 517 (D. Ala. 1975) (EIS inadequate - no evidence of balancing of interests and failure to discuss alternatives); Natural Resource Defense Council Inc. v. Grant, 355 F. Supp. 280 (D.N.C. 1973) (EIS found inadequate due to failure of full disclosure and consideration of alternatives).

[75] 5 U.S.C. §§ 701-702 (1976).

[76] 5 U.S.C. § 706(2) (1976). The agency is entitled to such deference due to its presumed expertise and experience in the area being ruled upon.

[77] Want, *supra* note 14, at 24.

[78] Seltzer & Steinberg, *Wetlands, supra* note 27, at 181.

[79] Want, *supra* note 14, at 25.

III. THE CASES

The lower southern states making up the Gulf Coast have frequently been at the forefront of environmental litigation. Far reaching decisions have been rendered in the federal courts of these states, shaping how our nation perceives such issues. One of the first cases determining the importance of environmental impacts with regard to wetlands development was that of *Zabel v. Tabb*.[80] In this case, the Corps' denial of a land filling permit under section 10 of the RHA was upheld by the courts based on the adverse effects such activity would have had upon local fish and wildlife.[81] The District Court for the Middle District of Florida had initially held that denial of a section 10 permit could not be supported unless the proposed activity in some way interfered with navigation, flood control or production of power.[82] In reversing this decision, the Fifth Circuit stated that there "was nothing in the statutory structure compel[1ing] the Secretary [of the Army] to close his eyes to all that others see . . . . The establishment was entitled, if not required, to consider ecological factors . . . .".[83] The judge found support for this departure from traditional Corps jurisdiction in the directives of the National Environmental Protection Act,[84] the Fish and Wildlife Coordination Act,[85] and in the legislative

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[80] 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

[81] *Zabel*, 430 F.2d at 215.

[82] *Id.* at 201.

[83] *Id.*

[84] 42 U.S.C. §§ 4321-4347 (1969). Though the Act was not in existence at the time the permit was denied, the court chose to measure the correctness of the decision by the standards in force at the time the case came up on appeal. *Zabel*, 430 F.2d at 213.

[85] 16 U.S.C. § 662(a) (1986). This Act reads in pertinent part:

> § 662. Impounding, diverting, or controlling of waters.
>
> (a) CONSULTATIONS BETWEEN AGENCIES.
>
> Except as hereafter stated in subsection (h) of this section, whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States, or by any public or private agency under Federal permit or license, such department or agency first shall consult with the United States Fish and Wildlife Service, Department of the Interior, and with the head of the agency exercising administration over the wildlife resources of the particular State wherein the impoundment, diversion, or other control facility is to be constructed, with a view to the conservation of wildlife resources by preventing loss of and damage to such resources as well as providing for the development and improvement

history behind these Acts.[86] The court concluded its discussion of the rejection of the application by stating that consideration of non-navigational impacts was mandated by Congress' enactment of these protective statutes.[87]

Challenges to Corps decisions, as to permit issuance and its own construction projects, make up a large part of wetlands litigation. Within this category fall those cases where plaintiffs claim non-compliance with NEPA by federal agencies. In *Sierra Club v. Froehlke,*[88] the environmental group[89] brought suit[90] under the new NEPA statute seeking to enjoin construction on a lake project in Texas.[91] This case is significant for its careful analysis of the requirements of an EIS and its explanation of the review process of decisions by the Corps and by the courts. Plaintiffs had contended that the EIS prepared by the Corps of Engineers was inadequate.[92] After a detailed analysis of the statute, its legislative history and federal regulations, the court agreed with the plaintiffs and an injunction was granted.[93] The district court set forth requirements for an adequate EIS as:

> (a) a detailed statement as to all possible significant effects on the environment whether beneficial or adverse;
> (b) A good faith effort at objectivity and compliance with NEPA;

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thereof in connection with such water-resource development.

Id.

[86] *See* S. Rep. No. 1981, 85th Cong. 2d Sess. *reprinted in* U.S. Code Cong. & Admin. News 3446, 3448-50 (1958) (Congress intended Corps to consult Fish & Wildlife Services before issuance of private dredge and fill operation permit).

[87] *Zabel,* 430 F.2d at 213.

[88] 359 F. Supp. 1289 (S.D. Tex. 1973), *rev'd sub nom.* Sierra Club v. Calloway, 499 F.2d 982 (5th Cir. 1974), *inj. vacated,* Sierra Club v. Froehlke, 816 F.2d 205 (5th Cir. 1987).

[89] *Froehlke,* 359 F. Supp. at 1306. The case was brought as a class action by five organizations and two individuals. These included the Sierra Club, the Houston Audubon Society, the Houston Sportsmen's Club and the Environmental Protection fund. *Id.*

[90] *Id.* at 1306-08. In addition to the Secretary of the Army, defendants included the Chief of the Corps of Engineers and the District Engineer. Intervening as defendant's were the Trinity River Authority, the City of Houston, the Coastal Industrial Water Authority of Texas and the cities of Fort Worth and Dallas. *Id.*

[91] *Id.* at 1306. The Wallisville Lake Project was authorized in 1962 by Congress and was to serve five purposes: salinity control, water supply, fish and wildlife enhancement, navigation and recreation. Construction began in 1966. *Froehlke,* 816 F.2d at 208.

[92] *Froehlke,* 359 F. Supp. at 1309. Though 28% complete when NEPA became law, the Corps was required to draft and circulate the EIS. *Id.* The project was 72% complete when enjoined. *Froehlke,* 816 F.2d at 208.

[93] *Froehlke,* 359 F.Supp. at 1385.

> (c) An administrative record with sufficient detail to make it understandable to laymen;
> (d) a sincere discussion of alternatives which may reduce or avoid some or all adverse effects.[94]

While recognizing that deference to an agency in its field of expertise is required under the APA,[95] the district court criticized the EIS as deficient. It failed to disclose the underlying basis for reliance upon one expert's opinions above another,[96] there was little discussion of alternatives to continuation of the project and the statement omitted discussion of environmental effects.[97] On appeal, the EIS was found to be adequate by the Fifth Circuit but the court left the injunction in place until a supplemental EIS could be compiled.[98] Then, after reconsideration of the project by the Corps, drastic modifications as to its size and scope were introduced by way of a wholly new EIS.[99] The project was reauthorized by Congress and the injunction vacated by the Fifth Circuit which held that the Corps fully complied with the procedural requisites of NEPA.[100]

As can be seen from this decision, inadequacy of an EIS can form a major stumbling block to those wishing to proceed with wetlands projects. Later cases have attempted to further define what will make an EIS inadequate. One factor to consider is whether secondary, indirect or cumulative effects have been properly addressed. A major wetlands case touching upon this issue is that of *Sierra Club v. Sigler*,[101] wherein it was stated that *"all factors which may be relevant to the proposal must be considered."*[102] In its review of a proposal to alter Galveston Harbor[103] to accommodate massive oil tankers, the Corps failed to offer a "worst case analysis"[104] which would include possible effects of an oil spill within the wildlife habitat. Clearly, this was indirectly connected with the dredge and fill activity for which permits were being sought, but in absolute harmony with the purposes behind NEPA. The Fifth Circuit literally read Corps regulations to require *all* foreseeable consequences be presented for public information and review. The scope of effects to be considered was defined as being those reasonably foreseeable and not wholly speculative.[105]

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[94] *Id.* at 1341-45.

[95] The decisions of the Corps concerning denial or issuance of permits under either § 10 or § 404, along with the EPA's exercise of its veto power under § 404, are considered final agency actions and are reviewable under the APA. H.E. Seltzer & R. Steinburg, *supra* note 27, at 181. *Accord* Avoyelles Sportsmen's Lodge v. Marsh, 715 F.2d 897, 904 (5th Cir. 1983) (arbitrary and capricious standard of review as to wetlands categorization and denial of permit); Deltona Corp. v. Alexander, 504 F. Supp. 1280, 1284 (M.D. Fla. 1981), *aff'd*, 682 F.2d 888 (standard of review for denial of permit arbitrary and capricious).

[96] *Froehlke*, 359 F. Supp. at 1322-25.

[97] *Id.* at 1384.

[98] *Froehlke*, 499 F.2d at 985.

[99] *Froehlke*, 816 F.2d at 208.

[100] *Id.* at 214-15. Cases have cited *Froehlke* as support for the proposition that NEPA has been complied with when the EIS at issue has alerted the public, interested agencies, and others of possible environmental consequences of proposed agency action. *See, e.g.*, City of North Miami v. Train, 377 F. Supp. 1264, 1272 (D.C. Fla. 1974) (EIS satisfied NEPA requirement by giving notice and opportunity for review to fullest extent possible).

[101] 695 F.2d 957 (5th Cir. 1983).

Where an initially adequate EIS has been created, there may be changes in either the project plans or in other circumstances for which a supplemental EIS (SEIS)[106] should be contemplated. The case of *Louisiana Wildlife Federation v. York*,[107] approaches the question of what "significant" change would warrant a supplemental EIS. The Corps had proposed a federally funded agricultural flood control and drainage plan and prepared an EIS for the proposal, which was received by the EPA in 1979.[108] A subsequent proposal for the project included the establishment of a national wildlife refuge for which a revised EIS was submitted. This revised EIS was approved without comment by the EPA.[109] Suit was brought to force the Corps to supplement its statement based on new information as to an alternative consideration procedure.[110] The Corps had assumed in its impact analysis that a large portion of the tract would be cleared regardless of the proposed project. With the advent of regulations subjecting these lands to the permit process, the assumption was no longer tenable and a supplemental EIS was required to analyze the assumption.[111] An important issue pointed out in this case is the legal standard in determining the need for an EIS. The court stated that it was the initial responsibility of the Corps to decide whether an EIS or SEIS is required.[112] If a party wished to challenge this determination, they must raise a substantial environmental issue; and even if this was done, the agency's decision would be upheld if it was reasonable.[113] It is clear that the burden of proof in these cases is upon the party seeking to compel preparation of the impact statement to show its necessity.[114]

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[102] *Sigler*, 695 F.2d at 982.

[103] *Id.* at 961. Galveston Harbor served as both a commercial waterway for Texas ports and as an estuary habitat for a large number of migratory birds and fish. *Id.*

[104] *Id.* at 973-75. Under previous CEQ regulations, if there existed "gaps in relevant information or scientific uncertainty" as to possible environmental effects of a proposed action then an educated worst case scenario was manditorily created along with a statement as to the probability of such an occurrence. 40 C.F.R. § 1502.22 (1981). This regulation has been modified by a newly promulgated regulation and no longer requires a "worst case analysis." 40 C.F.R. § 1502.22 (1986). However, if there is a lack of information as to effects and the information cannot be obtained due to technical or monetary restrictions, this lack of information must be made known. *Id.* at § 1502.22(b).

[105] *Sigler*, 695 F.2d at 974-75. *Cf.* Fritiofson v. Alexander, 772 F.2d 1225, 1237 (5th Cir. 1985) (Corps required to revise studies to include cumulative impacts); Vieux Carre Property Owners, Residents and Assoc., Inc. v. Pierce, 719 F.2d 1272, 1277 (5th Cir. 1983) (environmental assessment need not address effects of speculative future phases of development); SOWL v. Witherspoon, 638 F. Supp. 1158, 1162 (E.D. La. 1986) (assessment showed consideration of cumulative and alternative impacts; non-preparation of EIS reasonable).

[106] A supplemental EIS should be prepared whenever *significant impacts resulting from changes* in the proposal *or new significant impact information, criteria* or relevant circumstances impact upon the proposed action. 33 C.F.R. § 230.11(b) (1984) (emphasis added). *See* 40 C.F.R. § § 1502.9(c)(1) (1986) (when SEIS should be prepared); 40 C.F.R. § 1502.9 (1986) (distinctions between draft, final and supplemental EIS).

[107] 761 F.2d 1044 (5th Cir. 1985).

[108] *Id.* at 1049.

The cases discussed above are but a small sampling of the types of cases which have arisen after an EIS has been submitted. Because of the great deference given to an agency's final decision by the courts under the APA, success for plaintiffs seeking to have an EIS declared deficient is limited. Even when it is determined that the agency acted in an arbitrary and capricious manner, the usual remedy is a remand to the Corps for further development of the administrative record.[115] The converse decision not to prepare an EIS causes just as much, if not more, controversy.

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[109] *Id.* While the EPA did not require any further action by the Corps, there were indications that the draft was "inadequate". The Fifth Circuit, however, did not equate inadequate with unsatisfactory and upheld no further action by the Corps on the EIS. *Id.*

[110] *Id.* at 1049-50. The "new information" was the Fifth Circuit case of Avoyelles Sportsman's League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1985). The effect of *Avoyelles* was the subject to acreage requirements put forth by the developers to the permit analysis and review process. *York*, 761 F.2d at 1050.

[111] *Id.* at 1053.

[112] *Id.* at 1052. *See* Hiram Clarke Civil Club, Inc. v. Lynn, 476 F.2d 421, 424-25 (5th Cir. 1973) (Corps required to decide if EIS necessary).

[113] *York*, 761 F.2d at 1054.

[114] Sierra Club v. Froehkle, 359 F. Supp. 1289, 1334-35 (S.D. Tex. 1973) (initial BOP on plaintiff to make prima facie case). *Accord*, Creppel v. Corps of Engineers, 500 F. Supp. 1108 (E.D. La. 1980), *rev'd on other grounds*, 670 F.2d 564 (5th Cir. 1982) (abandonment of land reclamation without change in purpose of original project did not raise substantial environmental issue as this was within Corps discretion).

[115] Seltzer & Steinburg, *supra* note 27, at 182. *See* Dardor v. Lafourche Realty Co., Inc., 639 F.Supp. 1525, 1530 (E.D. La. 1986) (law settled that when agency decision not supported by record, proper procedure is remand).

Because it is not necessary to prepare an EIS in all instances where wetlands are affected[116] much time and effort is expended by plaintiffs to show why an EIS should be prepared. In these cases, the standard of review is of a less stringent nature.[117] This is in contrast to the generally accepted proposition that, "in the absence of fraud, administrative findings of fact are conclusive if supported by substantial record evidence."[118] An early wetlands case utilizing a reasonableness standard was that of *Simmans v. Grant.*[119] Suit was brought to enjoin the Federal Soil Conservation Office from construction of its channel improvement program on the grounds that an EIS was needed and failure to create one violated NEPA.[120] The district court set forth three factors to establish a prima facie case for the need of an EIS. First, the plaintiff must show inadequate evidentiary development before the federal agency. Without exhaustion of administrative remedies, the court will not look to supplement the administrative record.

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[116] An EIS is only required where there is a major federal action. The federal agency proposing a major federal action must prepare an environmental assessment and from this assessment determine whether an EIS is required. 40 C.F.R. § 1501.4(c) (1986). Further, should the agency find that an EIS is not necessary, then a "finding of no significant impact" (FONSI) statement shall be made public. 40 C.F.R. § 1501.4(e)(1) (1986). A finding of no significant impact is a document by a federal agency briefly presenting the reasons why an action, not otherwise excluded, will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it. If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference. 40 C.F.R. § 1508.13 (1986).

[117] The seminal case for this proposition is not a wetlands case, but because of its effect upon environmental law in the Fifth Circuit, a short discussion is warranted. Save Our Ten Acres (SOTA) v. Kreger, 472 F.2d 463 (5th Cir. 1973) presented the question of "What is the proper standard of review of an agency's threshold determination *not* to file an [EIS] under . . . NEPA?" *Id.* at 464. The court determined that to best effect the purpose of NEPA a "more relaxed rule of reasonableness" should be used rather than the narrow arbitrary and capricious standard. *Id.* at 465. The court continued, stating that NEPA was intended to insure that appropriate responsible officials considered environmental effects of each project, and to provide Congress with a sound basis of evaluating the environmental aspects of the project. *Id.* at 466. "The spirit of the Act would die aborning if a facile, ex parte decision that the project was minor or did not significantly affect the environment were too well shielded from impartial review." *Id.* Using *SOTA*, parties seeking to force the preparation of an EIS, are able to subject findings of no significant impact to a more "searching" review.

[118] *SOTA*, 472 F.2d at 465-66.

[119] 370 F.Supp. 5 (S.D. Tex. 1974).

[120] *Id.* at 8.

Secondly, the plaintiff must raise a substantial environmental issue. If this is done, the court will look at all the information that was presented to the agency to decide whether a "no significant impact" finding was reasonable.[121] Lastly, it is not for the court to decide the desirability of the project. The court is to decide only whether the agency has presented an administrative record as evidence of a "good faith hard look" at environmental concerns.[122] The defendants in this suit lost the case based on its failure to prepare such a record, particularly with respect to interagency review. However, this flaw was not enough to have an injunction granted.[123]

In *Sierra Club v. Hassell*[124] rather than a finding of no significant impact, the Corps decided that a proposal to replace a bridge destroyed by a hurricane did not amount to a "major" federal project[125] since it would be built where the previous bridge had been. Though the plaintiffs claimed an EIS was needed,[126] the court viewed the record presented and held the decision of the Corps was a reasonable one.[127] It was stated that the agency was not bound to elevate environmental concerns over other appropriate considerations and an inspection of the record by the court did not authorize its intrusion into an area within the discretion of the Corps as to what action would be chosen.[128] This would seem to be a return to the arbitrary and capricious standard, but later cases continue to apply the now well established "reasonableness" rule.[129]

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[121] *Id.* at 12. This reviewable record in the form of an environmental assessment, was characterized as a "mini-EIS". *Id.* at 17.

[122] *Id.* at 13.

[123] *Id.* at 22.

[124] 503 F. Supp. 552 (S.D. Ala. 1980), *aff'd*, 636 F.2d 1095 (5th Cir. 1981).

[125] *Hassell*, 503 F.Supp. at 563. *See supra* note 67 and accompanying text for discussion of "major federal project".

[126] *Hassell*, 503 F.Supp. at 561. Plaintiffs had three basic premises in support of their motion for summary judgment: no analysis and consideration of (1) alternatives, (2) detrimental effects, or (3) possible mitigation measures. *Id.*

[127] *Id.* at 563-64. Where there is no plan to alter the status quo an EIS will generally not be required. *Id.*

[128] There is an interesting footnote at this point where the court questions the viability of the Fifth Circuit "reasonableness" standard in light of the Supreme Court case of Stryckers Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980). *Hassell*, 503 F.Supp. at 561. The court's concern now appears unwarranted in view of the continued use of the "reasonableness" standard.

[129] *See* SOWL v. Witherspoon, 638 F. Supp. 1158 (E.D. La. 1986) (cites *SOTA*). *But see* Fritiofson v. Alexander, 772 F.2d 1225 (5th Cir. 1985) (reasonableness standard still appropriate though in conflict with other circuits); Louisiana v. Lee, 758 F.2d 1081 (5th Cir. 1985) (review of FONSI subject to "searching" standard); Orleans Audubon Society

NEPA has served as the starting point in other various attempts at defeating a development project. While many of these NEPA challenges have been successful, many others have not due to defendant's use of equitable and legal defenses such as estoppel,[130] laches[131] or failure to meet injunction requirements.[132]

In *Deltona Corp. v. Alexander*,[133] even though the Corps had issued permits for two of five parcels of land and knew of the developer's plans for further dredge and fill activity, the court rejected the estoppel argument presented by the plaintiffs.[134] "The act of granting a section 404 permit is unquestionably an exercise of the government's sovereign power to protect the public interest."[135] With this finding, the court granted summary judgment to the Corps on plaintiffs' estoppel claim.

Departing from the NEPA based suits and turning to those cases dealing primarily with the RHA and CWA, there are numerous similarities between issues presented and defenses utilized. These cases generally arise out of a conflict between private developers' actions and the Corps' attempts to enforce the CWA section 404 and/or section 10 RHA permit requirements. In 1974, soon after the CWA amendments of 1972, the defendant in *United States v. Holland*[136] protested the permit requirements of section 404 claiming that jurisdiction was lim-

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v. Lee, 742 F.2d 901 (5th Cir. 1984) (change in Corps decision from requiring permit to not requiring one reviewed under arbitrary and capricious standard); Save Our Wetlands (SOWL) v. Sands, 711 F.2d 634 (5th Cir. 1983) (cites *SOTA* and *Hassell*).

[130] *See* Environmental Defense Fund v. Alexander, 467 F. Supp. 885, 905 (N.D. Miss. 1979) (plaintiff had opportunity to be heard on issues litigated previously: collateral estoppel effective defense), *aff'd*, 614 F.2d 474, 478 (5th Cir. 1980). The Fifth Circuit is known for its commitment to the general rule that *the government* may not be estopped when acting in its sovereign capacity. Want, *supra* note 14 at 37. *See also* Weiszmann v. District Engineer, 526 F.2d 1302, 1305 (5th Cir. 1976) (government not estopped when acting as sovereign); United States v. Board of Trustees, 18 Env't Rep. Cas. (BNA) 1188, 1193 (S.D. Fla. 1981) (delay in issuing "cease and desist" order did not estop government).

[131] SOWL v. Corps of Engineer, 549 F.2d 1021, 1026 (5th Cir.), *cert. denied*, 434 U.S. 836 (1977) (inexcusable delay coupled with substantial completion of project constituted laches); SOWL v. Rush, 424 F. Supp. 354, 355 (E.D. La. 1976) (NEPA subject to laches defense).

[132] Florida Wildlife Federation v. Goldschmidt, 506 F. Supp. 350, 353 (M.D. Fla. 1981) (set forth standards for preliminary injunction).

[133] 682 F.2d 888 (11th Cir. 1982).

[134] *Id.* at 891.

[135] *Id.* at 892.

[136] 373 F. Supp. 665 (1974), *aff'd*, 695 F.2d 536 (11th Cir. 1985).

ited to navigable waters.[137] The court disagreed and stated that legislative history compelled a finding that Congress had defined away navigability as a restriction upon the Corps under the FWCPA.[138] The Corps jurisdiction over intertidal wetlands was affirmed and the defendant was required to obtain permits before further work could proceed.[139]

The later case of *United States v. Tilton*[140] grappled with the meaning of the term "adjacent"[141] and found that defendant's swamp property, though physically separated from the river,[142] was "adjacent" and thus within permit jurisdiction.[143] The far reaching ramifications of the Corps' permit jurisdiction is amply illustrated in the case of *United States v. Robinson*.[144] The defendant landowners were held to have violated the dredge and fill requirements of the CWA by discharging fill material into wetlands. The fill material was to serve as support for a cement patio addition to defendant's home.[145] The court found defendant to be in violation of the permit laws and ordered him to restore the site to its original condition.[146]

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[137] *Holland*, 373 F. Supp. at 671.

[138] *Id.* at 672. *See* SEN. REP. No. 92-1236, 92d Cong., 2d Sess. *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS, 3820, 3822 ("navigable waters" to be given broadest possible constitutional interpretation unencumbered by agency determinations).

[139] *Holland*, 373 F. Supp. at 677.

[140] 705 F.2d 429 (11th Cir. 1983).

[141] Corps regulations specifically address adjacent wetlands as being within their § 404 jurisdiction. This regulation reads in pertinent part:

> (d) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands".

33 C.F.R. § 323.2 (1986).

[142] *Tilton*, 705 F.2d at 431. The property was separated from the river by a berm which, at its narrowest point, was only 30 feet across. *Id.*

[143] *Id.* at 431. *See also* Bayou Des Families Dev. Corp. v. Corps of Engineers, 18 Env't. Rep. Cas.(BNA) 1696, 1701 (E.D. La. 1982) (Corps § 404 jurisdiction extends to manmade bodies of water adjacent to navigable river if water is subject to tidal motion). *Accord* United States v. Sexton Cove Estotes, Inc., 526 F.2d 1293, 1299 (5th Cir. 1976) (section 10 does not include landlocked, unconnected canals which had no effect on course, conduction a capacity or location of the waterway).

[144] 570 F. Supp. 1157 (M.D. Fla. 1983).

[145] *Id.* at 1160. Defendant had applied for a permit but proceeded with his project without them even after being told not to begin work. *Id.* at 1159.

[146] *Id.* at 1166. Before the litigation began, the defendant was granted a permit to fill part of the disputed property and restoration was not required for the area covered by the permit. *Id.* at 1161.

In *United States v. Board of Trustees*,[147] it was held that civil liability[148] under the CWA may not be avoided based on a lack of intent.[149] "Willful *or* negligent violations of the Act are separately punishable by criminal penalties under 33 U.S.C. § 1319(c)(1)."[150] The Florida Keys Community College had hired a construction company to conduct an alteration of wetlands property belonging to the school. The construction company relied upon the Board of Trustees to take care of permit requirements, which it failed to do.[151] Both the college and the construction company were found in violation of the CWA.[152] The remedy of restoration was deemed appropriate, but in consideration of other factors,[153] the court allowed the wetland area to be replaced rather than restored by modifying a different portion of the college's property. The construction crew was fined for its participation in the violation.[154]

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[147] 18 Env't. Rep. Cas. (BNA) 1188 (S.D. Fla. 1981).

[148] 33 U.S.C. § 1319(d) (1987).

[149] This statute reads in pertinent part:

> (1) Any person who —
>
> (A) negligently violates section 301, 302, 306, 307, 308, 318 or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 402(a)(3) or 402(b)(8) of this Act or in a permit issued under section 404 of this Act by the Secretary of the Army or by a State . . .
>
> (B) . . . shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.
>
> (2) Any person who —
>
> (A) knowingly violates section 301, 302, 306, 307, 308, 318 or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 402(a)(3) or 402(b)(8) of this Act or in a permit issued under section 404 of this Act by the Secretary of the Army or by a State . . .
>
> (B) . . . shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph punishment shall be by a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or both.
>
> (d) Any person who violates section 301, 302, 306, 307, 308, 318 or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by the Administrator, or by a State, or in a permit issued under section 404 of this Act by a State, or any requirement imposed in a pretreatment program approved under section 402(a)(3) or 402(b)(8) of this Act, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

33 U.S.C. § 1319 (1987).

In *Avoyelles Sportsmen's League v. Marsh*[155] the Corps was able to assert its permit jurisdiction under CWA due to a determination that bulldozers qualified as "point sources"[156] and that landclearing activities constituted "discharge of a pollutant" into waters of the United States.[157]

Despite the reach of Corps jurisdiction,[158] there have been effective defenses weighed against this permit power. In the companion cases of *United States v. Context-Marks Corp.*[159] and *Buccaneer Point Estates, Inc. v. United States*,[160] the Corps attempted to force property owners to obtain permits for work previously exempted and already done so as to be in compliance with the statutes. In *Context-Marks*, the permits were applied for and denied so defendant's were ordered by the Corps to remove the fill material.[161] The district court ordered partial restoration at the defendant's expense. The partial restoration was based on the court's refusal to require a retroactive application of the newly revised wetlands regulations.[162] In *Buccaneer Point*, the developer, relying upon surveys provided by the Corps, placed fill material above the high water mark indicated by the maps. The Corps thereafter found their own surveys unacceptable and issued a cease and desist order.[163] The Corps then determined its initial maps were correct and allowed work to continue without a permit for six months. After six months, the Corps' expanded regulations brought the property back within the Corps' jurisdiction and a permit was required pursuant to its regained jurisdiction even though the project was eighty percent complete. The court found no justification for such a requirement and stated that the equities weighed heavily in the developer's favor.[164]

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[150] *See supra* note 148.

[151] *Board of Trustees*, 18 Env't. Rep. Cas. (BNA) at 1190. While the board did apply for state permits, it failed to obtain the necessary federal permits. *Id.*

[152] *Id.* at 1194. Civil liability under these statutes is incurred either by (1) performance, or (2) responsibility for or control over performance without federal authorization. *Id.*

[153] *Id.* at 1145. The court found as mitigating and extenuating circumstances:

1. The violators were negligent rather than willful;
2. Deterrence with the imposition of a fine ($15,000);
3. The land served a public rather than private service;
4. There were some adverse factors to the sloughs prior condition; and
5. Availability of alternate area.

Id. at 1195.

[154] *Id.* The fine was $3,000.00. *Id.*

[155] 715 F.2d 897 (5th Cir. 1983).

[156] *Id.* at 922. *See supra* note 53 and accompanying text.

[157] *Avoyelles*, 715 F.2d at 922. *See also* United States v. MCC of Fla., Inc., 772 F.2d 1501, 1506 (11th Cir. 1985) (soil dredged by propellers of tugboats constituted discharge of a pollutant within meaning of CWA).

[158] *See, e.g.*, Texas Municipal Power Agency v. Administrator of the EPA, 836 F.2d 1482, 1486 (5th Cir. 1988) (Corps jurisdiction extended to waste streams and canals).

[159] 729 F.2d 1294 (11th Cir. 1984).

[160] 729 F.2d 1297 (11th Cir. 1984).

Other cases have arisen under the CWA and RHA based upon suits by private individuals to enforce the provisions of these acts. Individuals may bring suit under section 505(a) of the CWA.[165] Until 1981,[166] it was widely thought that there existed an implied right of action under section 10 of the RHA.[167] The Fifth Circuit, however, did not feel that such was the case as evidenced by *United States v. Florida-Vanderbilt Development Corp.*[168] Plaintiff brought suit to enforce violations of the RHA, hoping in part to share in any penalties paid to the government.[169] The court stated that, though section 411[170] of the RHA did require a sharing of a penalty with an informant upon conviction of the violator, there was no statutory basis for claiming that such sharing created a right to bring an original action.[171] This position is in keeping with the present day interpretation of section 10.[172]

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[161] *Context-Marks*, 729 F.2d at 1296.

[162] *Id.* The court declined to recognize an equitable estoppel and relied instead upon equitable standards for fashioning relief for the government. *Id.* at 1296-99.

[163] *Buccaneer Point*, 729 F.2d at 1298.

[164] *Id.* at 1299. As in *Context-Marks*, 729 F.2d at 1296-99, the court did not label its decision as one based on estoppel, but as a balancing of equities. *Buccaneer Point*, 729 F.2d at 1299.

[165] This section permits any citizen to commence a civil suit against any person alleged to be violating a standard or limitation under the Act. Remedies include enforcement and/or civil penalties. 33 U.S.C. § 1365(a) (1986). *See supra* note 58 and accompanying text.

[166] In 1981, the Supreme Court held in California v. Sierra Club, 451 U.S. 287 (1981) that the RHA did not authorize private actions under § 10 of the RHA for violations of its provisions. *Id.* at 292-98.

[167] *See, e.g.*, Alameda Conservation Ass'n v. California, 437 F.2d 1087, 1092-93 (9th Cir. 1971), *cert. denied*, 402 U.S. 908 (1972) (no implied right of action under section 10); Potomac River Ass'n v. Lundeberg Maryland Steamship School, Inc., 402 F. Supp. 344, 357 (D. Md. 1975) (same).

[168] 326 F. Supp. 289 (S.D. Fla. 1971).

No area of the law operates in a vacuum, including environmental law. The previous discussion has dealt primarily with those statutes touching directly upon wetlands protection. Other substantive statutes may offer solutions to effectuate the purposes of preservation.[173] The Endangered Species Act (ESA)[174] has been so used. Though combined with a NEPA claim, the sandhill crane was really rescued by the ESA in *National Wildlife Federation v. Coleman*[175]. The Department of Transportation was sued to enjoin construction of a highway segment which was slated to be run directly through breeding grounds of the crane.[176] The injunction was granted based on the ESA until such time as necessary modifications were made and adopted to ensure the crane's habitat was not in any way destroyed or modified.[177] Unfortunately, the ESA is not a guarantee of victory. In *Environmental Coalition of Broward County, Inc. v. Myers*[178] the plaintiffs sought an injunction against continued work under a section 404 permit issued by the Corps on three grounds:

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[169] *Id.* at 290.

[170] Section 411 of the RHA reads:

> § 411. PENALTY FOR WRONGFUL DEPOSIT OF REFUSE; USE OF OR INJURY TO HARBOR IMPROVEMENTS, AND OBSTRUCTION OF NAVIGABLE WATERS GENERALLY
>
> Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections 407, 408, and 409 of this title shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction.

33 U.S.C. § 411 (1982).

[171] Plaintiff argued a *qui tam* theory (*qui tam pro domino rege quam prosi ipso in hae parte sequistur*), which translates, "He who sues on behalf of the King as well as himself." BLACK'S LAW DICTIONARY 1127 (5th ed. 1979).

[172] *See supra* note 166.

[173] Under a substantive duty imposed by another statute, an agency may not be able to act as planned even if all the proper procedures are followed, including the issuance of a good EIS. J. BONINE & T. MCGARITY, THE LAW OF ENVIRONMENTAL PROTECTION 218 (1984).

[174] Endangered Species Act of 1973, 16 U.S.C. § 1536 (1976). Section 7 of this Act requires that a federal agency do more than merely "consider" the effects of a proposed project. The agency must insure that actions taken or financed by them do not endanger the existence of a species or its critical habitat. Apparently there are few exceptions to the rule as pointed out in TVA v. Hill, 437 U.S. 153 (1978) (also known as "Snaildarter" case) where completion of a dam in Tennessee was effectively forestalled by the existence of a 3-inch fish classified as endangered. *See* 16 U.S.C. § 1532(6) (1982) (endangered species defined). The dam was not allowed to operate until Congress specifically authorized its completion. J. BONINE & T. MCGARITY, *supra* note 173, at 229.

[175] 529 F.2d 359 (5th Cir. 1976).

> (1) The application for the permit did not adequately describe the activities to be carried out;
> (2) The fill material was not being used as proposed; and
> (3) The dredging activities disturbed the critical habitat of the manatee, an endangered species.[179]

The court denied an injunction based on the administrative record presented to it by the agency. The project was coordinated with all other necessary government agencies so as to minimize the impact upon the manatee, and the issuance of the permit was upheld.[180]

Permit requirements have even been raised in real estate contract disputes. The Northern District of Mississippi held in *McCain v. Cox*[181] that a failure to obtain permits for development prior to sale of the property for development purposes did not constitute a breach of contract by the seller.[182] The buyer contended title to the land was not merchantable without the permits, as the land could not be resold for development. The court held, however, that a mistake of law by both parties did not constitute grounds for relief from the contract and the buyer could not rescind the contract based on the failure to obtain the permits.[183]

Turning to another major issue in wetlands litigation, it can be seen that many times when a landholder is prevented from developing property in the most profitable manner, a claim that the property has been "taken"[184] will be made.[185] The taking issue was raised in *Zabel v.*

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[176] *Id.* at 361. The sandhill crane is an endangered species within the meaning of the Act and required this wetlands area for breeding and nursery purposes. *Id.* at 362.

[177] The Jackson County I-10 segment was finally completed in 1984.

[178] 831 F.2d 984 (11th Cir. 1987).

[179] *Id.* at 985-87.

[180] *Id.* at 987. Justice Tuttle dissented from this decision basing his disagreement upon the inadequate description of the project and so did not reach the other issues. *Id.*

[181] 531 F. Supp. 771 (N.D. Miss. 1982).

[182] *Id.* at 780.

[183] *Id.* at 781.

[184] U.S. Const. amend. V. (The Just Compensation Clause). "[N]or shall private property be taken for public use without just compensation." *Id.*

Tabb[186] but was summarily dismissed by the court which stated that there was no taking because "the waters and underlying land are subject to the paramount servitude" of the federal government.[187] Though seldom upheld, the taking claim is still raised; and within the more recent cases, a greater analysis of the facts and a more careful consideration of the claims can be discerned.

One example of this evolution is the case of *Deltona v. United States*.[188] The Corps had denied a section 404 permit to the developer for dredge and fill activities on the Florida Gulf Coast.[189] Though permits had been granted for one parcel under section 10 of the RHA and a second permit was also granted[190] under section 404 for the next parcel, two permit applications for the following three areas were denied, based on the probable damage that would occur to the wetlands at issue.[191] After a background analysis of the application of the taking clause, the Court of Claims[192] espoused the general principle that while property may be taken by virtue of a government regulation, where ownership is not extinguished and other viable economic uses still exist, a taking will not be deemed to have occurred.[193] That a dimunition in market value will not effect a taking has been recognized in other

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[185] Much has been written about this aspect of environmental law and wetlands. *See, e.g.*, Seltzer & Steinburg, *supra* note 27, at 184-96 (history of taking clause and its application to wetlands); Comment, *The Taking of Wetlands Under § 404 of the Clean Water Act*, 17 ENVTL. L. 111, 117-22 (1986) (same). *See also* Want, *supra* note 14, at 29-36 (1984) (regulatory taking as a defense to environmental controls).

[186] 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

[187] *Zabel*, 430 F.2d at 215.

[188] 657 F.2d 1184 (Ct. Cl. 1981).

[189] *Id.* at 1189. The area was known as Marco Island and was divided into five separate stages for development. *Id.* at 1188.

[190] *Id.* at 1188. This second permit was granted conditioned upon an "understanding" that the grant did not imply future permits would also be issued. *Id.* Additionally, Deltona could not advertise or sell undeveloped lots where permits had not been obtained. *Id.*

[191] *Id.* at 1189. The Chief of Engineers concluded that Deltona had failed to prove that benefits from the housing projects would outweigh the anticipated destruction. Further, the Corps did not wish to create a precedent for development in similar areas of the coast. *Id.* at n.9. The third permit was issued because the project was so near completion that little could be done to forestall damage. *Id.* at 1188.

[192] Under the Tucker Act, the Court of Claims was vested with exclusive jurisdiction to hear those laws in the nature of a contract dispute with the United States in excess of $10,000. 28 U.S.C. § 1491 (1976).

[193] *Deltona*, 657 F.2d at 1192. While acknowledging the corporation's frustration of economic expectation, the court also noted that the present value of undeveloped areas exempt from permits was twice the purchase price of the entire tract. *Id.*

contexts[194] and continues to be articulated in wetlands litigation.[195]

A slight variation in the typical taking claim was presented in *Allain-Lebreton Co. v. Department of the Army.*[196] The plaintiff sought declaratory and injunctive relief, plus damages against the Corps, the Fish and Wildlife Division of the Interior and the District Board of Commissioners. The plaintiff alleged that the decision *not* to locate a protection levee on certain of its lands constituted a taking. The company desired to have neighboring wetlands enclosed so that additional property might also be developed. The court rejected this argument stating, "[T]he sovereign must pay only for what it takes, not an opportunity the owner loses."[197]

Deciding whether a taking has occurred may be a question for the jury, as it was in the case of *Lachney v. United States*[198]. Due to an interagency dispute[199] as to the classification of plaintiff's property, the permit process took over three years to resolve while plaintiff suffered crop losses, increased clearing costs, and interest on borrowed funds used while waiting for the determination on his property.[200] The court stated, that unlike *Deltona,*[201] it had not yet been determined whether the permit period did not "deprive plaintiff of the economically viable use of its land."[202] Defendant's motion for summary judgment[203] was denied.

The taking standard is a difficult one to meet. There is a case arising out of activities in Florida coastal wetlands which stands for the proposition that a taking will only be found where the developer exhausts all options for the property and permit denial prevents all economically viable uses. This case of *Florida Rock Indus. v. United*

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[194] *See, e.g.,* Penn. Central Transp. Co. v. New York City, 438 U.S. 104, 135 (1978) (dimunition at 75% due to zoning not a taking); Agins v. City of Tiburon, 24 Cal. 3d 266, 274-77, 598 P.2d 25, 29-31 (1979), *aff'd,* 447 U.S. 255 (1980) (restrictive zoning not a taking).

[195] *See* Jentgen v. United States, 657 F.2d 1210, 1213 (Ct. Cl. 1981) (diminution rather than destruction of all viable economic uses not a taking).

[196] 670 F.2d 43 (5th Cir. 1982).

[197] *Id.* at 45 (citing Johnson v. United States, 479 F.2d 1383, 1392-93 (Ct. Cl. 1973)).

[198] 2 Cl. Ct. 244 (1983).

[199] *Id.* at 245. The agencies involved were the EPA, the U.S. Army Corps of Engineers, and the Fish and Wildlife Service. *Id.*

[200] *Id.* at 246.

[201] Deltona Corp. v. United States, 657 F.2d 1184 (1981), *cert. denied,* 455 U.S. 1017 (1982). *See supra* notes 133-35, and accompanying text.

[202] *Lachney,* 2 Cl. Ct. at 246.

[203] *Id.* at 245. Defendant argued that since plaintiff eventually got his permit no taking had occurred as a matter of law. *Id.*

States[204] announced a standard by which residual value in property affected by permit denial should be evaluated. The Federal Circuit offered these factors for determining whether a taking has occurred:

> (1) The relationship between the owner's base or investment and the fair market value prior to the alleged taking to the firm market value subsequent;
> (2) severity of economic impact, and
> (3) whether the owner will have an opportunity to recoup his investment subject to the regulation.[205]

The district court indicated its opinion that a taking had indeed occurred,[206] but the Federal Circuit found the district court's other findings of fact to have usurped the functions of the agency.[207] The case was remanded to reassess damages. *Florida Rock* stands as one of the few Federal Circuit cases where a taking was found to have occurred. The later case of *Conant v. United States*[208] stands as a rejection of any relaxed standard on this issue. Plaintiff had built a series of ponds on his property for the purpose of engaging in catfish farming. The last of these ponds, number 9, was deemed by the Corps to be within protected wetlands under section 404 of the CWA and plaintiff was ordered to apply for a permit. Plaintiff maintained that his farming activity was exempt under section 402 of the CWA. The District Court of Florida held that the activities were subject to Corps authority under section 404 and required defendant to apply for permits before any taking action could be brought. The court stated that a "mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking."[209] Regulations will be deemed a taking only if they prevent all use or all economic use of an *entire* property, including "investment backed expectations."[210] The action was dismissed. Because the accepted position of the courts is that property is generally found to have residual value, the existence of a regulation which adversely affects its fair market value will not be deemed a taking.[211]

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[204] 791 F.2d 893 (D.C. Cir. 1986), *cert. denied,* 107 S. Ct. 926 (1987).

[205] *Florida Rock,* 791 F.2d at 902-04.

[206] *Id.* at 900-04. The claims court found a taking had occurred because plaintiff had no reasonable economic uses for the property. Florida Rock Indus. v. United States, 8 Cl. Ct. 160, 165 (1985).

[207] *Florida Rock,* 791 F.2d at 905.

[208] 12 Cl. Ct. 689 (1987).

[209] *Id.* at 692. (quoting United States v. Riverside Bayou Homes, Inc., 474 U.S. 121 (1985)).

[210] *See* Seltzer & Steinburg, *supra* note 27, at 196.

CONCLUSION

As has been presented above the cases arising out of the Gulf Coast states exemplify wetlands litigation as a whole. Significant choices with respect to such issues as the standard of judicial review of agency decisions and regulatory takings show the Fifth and Eleventh Circuits to be cognizant of environmental concerns. Although these confrontations between developers and conservationists may seem to many "much ado about nothing", the battles are fierce, time-consuming and expensive. The federal government expends large blocks of resources in its attempts to balance competing interest. Through such legislation as the Emergency Wetlands Resources Act[212] and other such appropriations acts,[213] the federal government also purchases and manages those "priority" wetlands, which are critical, scarce, and vulnerable. The direction of Congress, at least, seems to be toward favoring conservation efforts with respect to these wetland areas. Progress has been made since the first permit was ever denied based on ecological reasons;[214] however, the advocates of wetlands protection and conservation generally still meet with opposition. Government regulation of private wetlands has been lessened so as to allow maximum use of the property. President Reagan has assisted in this area by issuing Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Rights;[215] wherein, it was ordered administrative agents which had "taking authority" be made to further substantiate and justify any action with taking implications.[216] This is true even when the proposed action is for the protection of public health or safety.[217] There are still major issues yet to be resolved such as: (1) the extent of section 404 activities regulated in "isolated" wetlands; (2) the nation's need for a unified national wetlands policy goal; and (3) the possible parameters and ramifications of such a goal.

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[211] J. Kusler & E. Meyers, *The Taking Issue and Land Regulation in the U.S. Supreme Court*, 9 NAT'L WETLANDS NEWSL. 11 (Jul-Aug 1987).

[212] Emergency Wetlands Resources Act, 16 U.S.C. § 308 (1988).

[213] *See, e.g.*, Estaurine Sanctuary Resources Program, 16 U.S.C. § 1461 (1982) (acquisition of areas to be maintained and operated as estuary sanctuaries); Coastal Zone Management Act, 16 U.S.C. §§ 1454, 1456 (1982) (federal grants for development of coastal management and preservation programs); Water Bank Act of 1970, 16 U.S.C. § 1301 (1970) (preservation of wetlands designated as important for nesting and feeding of migratory fowl).

[214] *See supra*, note 79 and accompanying text.

[215] Exec. Order No. 12,630, 53 Fed. Reg. 8859 (1988).

[216] *Id.* at 8861-62.

[217] *Id.*

The Gulf Coast states have frequently been in the position to make environmental law because of their interdependence upon these humble lands; the southern states have become a testing ground for federal legislation implementation. Results, though mixed at best, do show some regard for the policies behind the statutes and an awareness of the importance of the area's existence. The struggles will obviously continue. Communities cannot help but expand and encroach upon all other habitats. Careful consideration of all effects, a true "hard-look" at these effects and possible alternatives are the only ways at this time that these issues can be managed. It can be said that the southern states have attempted to adhere to the spirit as well as the letter of these laws.

J.D. Lee

ALIMONY AND CHILD SUPPORT: ARE THEY DISCHARGEABLE IN BANKRUPTCY IN THE FIFTH CIRCUIT?

I. INTRODUCTION

From the individual debtor's perspective,[1] the primary purpose of filing a bankruptcy petition is to obtain relief from indebtedness through discharge.[2] A discharge in bankruptcy acts to extinguish, or legally excuse, the obligation to repay the debt[3] and to allow the beginning of the debtor's "fresh start."[4] The Bankruptcy Code provides an exception to discharge for debts representing support obligations to a spouse, former spouse, or child,[5] which is indicative of congressional judgment that the need to enforce obligations arising from the "family relationship and stability generated thereby outweighs the general bankruptcy goal of fresh start."[6]

In 1986, the United States Bankruptcy Court in the Northern District of Mississippi adopted a four-part test to determine whether a debtor's obligation to a former spouse as set forth in a divorce decree is actually in the nature of alimony, support, or maintenance, and is, therefore, nondischargeable in a bankruptcy proceeding, falling within the exception under 11 U.S.C. § 523(a)(5). Bankruptcy Judge David W. Houston, writing in *In re Sullivan*,[7] applied a modified version of a test formulated in the 1983 Sixth Circuit landmark decision *In re Cal-*

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[1] Under the Bankruptcy Code, an individual debtor may receive a discharge from debts in chapter seven liquidation cases (§ 727), chapter 11 reorganizations (§ 1141(d)), chapter 12 family farmer bankruptcies (§ 1228), and chapter 13 adjustments of debt (§ 1328). Partnerships, corporations, and other qualified organizations may be granted a discharge under chapter 11 reorganizations (§ 1141(d)).

[2] B. WEINTRAUB & A. RESNICK, BANKRUPTCY LAW MANUAL ¶ 3.01 (1986). The United States Supreme Court stated that one of the primary purposes of the former Bankruptcy Act was to "relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations consequent upon business misfortunes." Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934)(quoting Williams v. U.S. Fidelity & Guar. Co., 236 U.S. 549, 554-55 (1915)).

[3] WEINTRAUB & RESNICK, *supra* note 2, ¶ 3.05. Denial of discharge means all debts will survive bankruptcy. *Id.*

[4] *Id.*

[5] 11 U.S.C. § 523 (a)(5) (1982 & Supp. 1986).

[6] *In re* Morris, 14 Bankr. 217, 220 (Bankr. D. Colo. 1981).

[7] 62 Bankr. 465 (Bankr. N.D. Miss. 1986).

houn.[8] The application of such a test opens a "big door" to allow dischargeability or apportionment of support obligations in bankruptcy, effectively resulting in federal court modification of a state court matrimonial decree.[9]

Bankruptcy courts have been hesitant to act as "super divorce courts" and delve into areas which have traditionally been within the realm of state government.[10] The impact of such an action can be significant when one considers that there is often a close nexus between bankruptcy and divorce; often bankruptcy is one of the factors leading to divorce, or one partner might file bankruptcy after the divorce for relief from overwhelming financial burdens.[11] Because of the dramatic increase in recent years in the numbers of divorces and bankruptcies, along with the corresponding increase in litigation over dischargeability of support obligations, the anticipation of the bankruptcy contingency and its potential consequences may be an important aspect of domestic relations practice.[12]

To assist the reader in understanding the impact of the *Calhoun* decision on the dischargeability of family support obligations, this comment will summarize the history of the development of 11 U.S.C. § 523(a)(5) as an exception to discharge, reviewing conflicting policies in bankruptcy and domestic relations law. I will address the *Calhoun* doctrine, the application of that doctrine in *In re Sullivan*, and will review the separate line of authority within the Fifth Circuit. I will then review the treatment of section 523 (a)(5) litigation by the courts of other circuits, particularly addressing those circuits which have rejected the *Calhoun* reasoning. Finally, I will briefly address the collateral estoppel effect of a state court decision regarding dischargeability on a federal bankruptcy court.

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[8] 715 F.2d 1103 (6th Cir. 1983).

[9] *Id.* at 1109 n.10. *See* Ravin & Rosen, *The Dischargeability in Bankruptcy of Alimony, Maintenance, and Support Obligations*, 60 AM. BANKR. L.J. 1, 15 (1986) (*Calhoun* inquiry has effect of modifying judgments of state courts in exclusively non-federal matters).

[10] Forsdick v. Turgeon, 812 F.2d 801, 803-04 (2d Cir. 1987). *See In re* Talley, 57 Bankr. 75, 77 (Bankr. W.D. Mo. 1985) (bankruptcy court cannot modify basic award by state court; not within court's power to redetermine basic need of plaintiff). *Cf. In re* Helm, 48 Bankr. 215, 225 (Bankr. W.D. Ky. 1985) (fully litigated questions of support not subject to second-guessing by bankruptcy judges sitting as "super-divorce courts," but those obligations settled by agreement subject to re-examination by bankruptcy court).

[11] Kline, *Bankruptcy and Divorce*, 10 OKLA. CITY U.L. REV. 561, 561 (1985). *See* Mednick, *Alimony and Bankruptcy: A Delicate Balance*, 8 FAM. ADV. 20, 20-21 (1986) (summary of effect of automatic stay and discharge in divorce context).

[12] Kline, *supra* note 11, at 562.

II. HISTORICAL OVERVIEW OF EXCEPTION TO DISCHARGE FOR POST-MARITAL SUPPORT OBLIGATIONS

Article I of the United States Constitution grants to Congress the power to establish uniform bankruptcy laws.[13] Congress enacted such laws as early as 1800;[14] however, no express statutory exception to discharge for support obligations existed until 1903.[15] Previous to this, the courts typically found an exception to discharge for alimony and child support.[16]

The United States Supreme Court held early on, in *Audoben v. Sholfelat*,[17] that the husband's obligation to support his wife is not a debt dischargeable in bankruptcy under the Bankruptcy Act of 1898.[18] The court reasoned that alimony was not founded on contract,[19] but on the "natural and legal duty of the husband to support the wife."[20]

In a 1903 decision, *Dunbar v. Dunbar*,[21] the Court dealt with the dischargeability of a contractual child support obligation which was not incorporated into a divorce decree.[22] The Court held that Congress did not intend for bankruptcy to absolve a father through discharge of his common law obligation to support his children.[23]

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[13] U.S. CONST. art. I, § 8, cl. 4. "The Congress Shall have Power . . . To establish . . . uniform laws on the subject of Bankruptcies throughout the United States." *Id.*

[14] Bankruptcy Act of 1800, 2 Stat. 19 (1800) (repealed 1803).

[15] Act of Feb. 5, 1903, Pub. L. No. 57-62, ch. 487, § 17, 32 Stat. 797, 798 (amending Bankruptcy Act of 1898, ch. 541, § 17, 30 Stat. 544, 550)(repealed 1979); *See* Note, *Congressional Intent in Excepting Alimony, Maintenance, and Support from Discharge in Bankruptcy*, 21 J. FOUND, L. 525, 526 (1982-83).

[16] *See In re* Lachemeyer, 14 F. Cas. 914, 915 (S.D.N.Y. 1878) (No. 7966) (alimony is sanction devised by law for enforcement of martial duty and is outside purview of bankruptcy system); *In re* Garrett, 10 F. Cas. 47, 47 (E.D. Va. 1875) (No. 5252) (discharge in bankruptcy does not release husband from liability to pay alimony). *But see In re* Houston, 94 F. 119, 120-21 (D. Ky. 1899) (holding alimony as debt dischargeable in bankruptcy).

[17] 181 U.S. 575 (1901).

[18] *Id.* at 577. The 1898 Act defined discharge as a release of those debts provable in bankruptcy with the exception of those debts excepted under the Act. Bankruptcy Act of 1898, ch. 541, § 1, 30 Stat. 544 (1899) (repealed 1979). The provability concept does not appear in the Code. Ravin & Rosen, *supra* note 9, at 3.

[19] *Audoben*, 181 U.S. at 577. The Court found that alimony did not arise from a business transaction but from the marriage relations. *Id.*

[20] *Id.*

[21] 190 U.S. 340 (1903).

[22] *Id.* at 341-42; *See note, supra* note 15, at 527 (summary of *Dunbar*).

[23] *Dunbar*, 190 U.S. at 352.

In *Wetmore v. Markoe*,[24] decided one year later, the Court elaborated on the conflicting policy considerations inherent in the bankruptcy "fresh start" concept and the "duty to support" obligations, determining that the former policy should be subordinated to the duty to support.[25] In *Wetmore*, the debtor contended that since alimony and child support obligations were determined by a judicial decree and not subject to modification, they were provable debts[26] and dischargeable in bankruptcy.[27] The Court rejected this argument and, in finding the debt was alimony, held that a court was not bound by the label attached by the state court and had the power to "sift the circumstances" to ascertain the nature of the liability.[28] The Court further stated that bankruptcy laws were designed to provide relief to the debtor from the weight of oppressive indebtedness, permitting him a "fresh start in business or commercial life, freed from the obligations and responsibilities which have resulted from business misfortunes."[29] The Court concluded that absent positive requirement by direct enactment of Congress, the law should not be interpreted as a means of avoiding enforcement of the moral and legal obligation of a husband to support his wife and children.[30]

Congress amended the Act in 1903 to provide that a bankrupt would not be discharged from his liability "for alimony due or to become due, or for maintenance or support of wife or child."[31] In making the determination of whether an obligation arising from a divorce settlement was in the nature of support or, in fact, a property settlement,[32] the bankruptcy courts looked to the applicable state law rather than to federal law.[33] The language of the congressional exception to discharge remained the same until the enactment of the new title eleven of the Bankruptcy Code into positive law on November 6, 1978.[34]

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[24] 196 U.S. 68 (1904).

[25] *Id.* at 77. *See* Westmoreland v. Dodd, 2 F.2d 212, 213-14 (5th Cir. 1924), *cert. denied*, 267 U.S. 595 (1928) (alimony is not debt in legal sense but enforcement of marital duty in accordance with public policy); *Note*, *supra* note 15, at 527-28.

[26] Under the Bankruptcy Act of 1898, those debts which could be provided and allowed against the bankrupt's estate were those which were "a fixed liability, as evidenced by a judgment or instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not. . . ." Bankruptcy Act of 1898, ch. 541, § 63, 30 Stat. 544, 562 (1899) (repealed 1979).

[27] *Wetmore*, 196 U.S. at 69-70.

[28] *Id.* at 74.

[29] *Id.* at 77.

[30] *Id.* In Shine v. Shine, 802 F.2d 583 (1st Cir. 1986), the court stated that the conflicting interpretations of § 523 (a)(5) are the result of two established public policies. *Shine*, 802 F.2d at 585. The general bankruptcy rule is to construe exceptions to discharge against the creditor, resulting in a narrow construction of the statute. *Id.* The *Shine* court held that the legislative history indicated Congress intended a broad interpretation of the exception to protect the families of bankrupts. *Id.* at 587.

[31] Act of Feb. 5, 1903, Pub. L. No. 57-62, ch. 487, § 17, 32 Stat. 797, 798 (amending Bankruptcy Act of 1898, ch. 541, § 17, 30 Stat. 544, 550) (repealed 1979).

III. EXCEPTION TO DISCHARGE FOR SUPPORT OBLIGATIONS UNDER THE BANKRUPTCY CODE

Under the Bankruptcy Code, the concept is continued in section 523 that certain debts should be excepted from discharge, including those for familial support obligations.[35] Section 523(a)(5) delineates an exception to discharge for a debt owed a spouse, former spouse or child if the debt is in the nature of alimony, maintenance, or support.[36] For a debt to be excepted from discharge four requirements must be met:

1. The debt must be to, or for the benefit of a spouse, former spouse, or child of the debtor.
2. The debt must not have been assigned to another entity other than the federal government, state government or a political subdivision of a state, unless assigned pursuant to the Social Security Act.
3. The debt must have arisen in connection with a separation agreement, property settlement, or other order of a court of record.
4. It must actually be in the nature of alimony, maintenance, or

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[32] *See* Weintraub & Resnick, *From the Bankruptcy Courts: The Bankruptcy Court's Role in Determining Nondischargeability of Obligations Owed to a Former Spouse*, 18 U.C.C. L.J. 272, 273-75 (1986) (fine distinction exists between nondischargeable support obligations and dischargeable property settlement obligations which leads frequently to litigation).

[33] Hirsch & Hirsch, *'Till Debts Do Us Part*, 23 ARIZ. B. J., Oct.-Nov. 1987, at 22, 31.

[34] Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. § 11 *et seq.* 1978); *see* Ravin & Rosen, *supra* note 9, at 2 (last substantial overhaul of bankruptcy system was 1978).

[35] Ravin & Rosen, *supra* note 9, at 2. A literal reading of § 523(a)(5) would discharge all obligations under a divorce decree which were not paid directly to a spouse, former spouse, or child. Kline, *supra* note 11, at 571. Legislative history indicates Congress intended for dischargeability to rest on its true nature and not on technicalities. *Id.* at 572. *See In re* Chambers, 36 Bankr. 42, 45 (Bankr. W.D. Wis. 1984) (debt to their party is nondischargeable support when intended to so serve); *In re* Williams, 703 F.2d 1055, 1057 (8th Cir. 1983) (same). *See generally* Ravin & Rosen, *supra* note 9, at 18-20 (dischargeability of assigned debts).

[36] 11 U.S.C. § 523(a)(5) (1982 & Supp. 1986).

support.[37]

In determining whether the debt arises from the support duty rather than a property settlement, which is dischargeable under section 523(a)(5), the Code directs the bankruptcy court to embark upon a new analysis based upon federal law rather than state law.[38] The legislative history as contained in the House and Senate reports is unequivocable that federal law should control.[39]

IV. USE OF STATE LAW AS A GUIDE IN THE DETERMINATION

Since divorce, alimony, and maintenance are issues exclusively within the domain of state courts,[40] and there is no federal law of domestic relations,[41] it is unlikely that Congress intended that state law be ignored completely.[42] Judge Cornelia G. Kennedy, writing in *Calhoun*, stated that since federal bankruptcy courts are not empowered to create a support obligation where one previously did not exist, the underlying obligation is necessarily determined by state law;[43] however, neither legislative history nor case law resolves the extent to which a bankruptcy court should resort to state law.[44] The bankruptcy court is confronted by the conflicting goals of federal law in providing a "fresh start" for the debtor and of state law in providing for the needs of the spouse and children following divorce.[45] Many bankruptcy courts follow the rationale adopted by the Second Circuit in *In re Spong*,[46] that while state law is not binding on the issues, it provides a useful sort of "guidance."[47] The *Calhoun* court addressed the difficulties inherent in the use of this rationale and the divergent dispositions which have resulted from its utilization:

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[37] Rankin v. Allaway, 37 Bankr. 420, 424 (Bankr. E.D. Pa. 1984).

[38] Weintraub & Resnick, *supra* note 32, at 273-74. *See* H.R. REP. No. 595, 95th Cong., 1st Sess. 363 (1977) ("what constitutes alimony, maintenance, or support is to be determined under the bankruptcy laws, not state law"); S. REP. No. 989, 95th Cong., 2d Sess. 77-79 (1978) (same). *See also In re* Spong, 661 F.2d 6, 9 (2d Cir. 1981) (Congress intended that federal law rather than state law should control determination of whether obligation is in nature of support); *In re* Calhoun, 715 F.2d 1103, 1107 (6th Cir. 1983) (same). There are three basic scenarios which arise from the statute: (1) Where the payment or settlement agreement is for alimony, maintenance, or support, the debt is nondischargeable; (2) Where the payment is a property settlement, the debt is discharged; (3) Where the property settlement is made in connection with alimony, maintenance, or support, the debt is not discharged. *In re* Singer, 787 F.2d 1033, 1034 (6th Cir. 1986).

[39] *Calhoun*, 715 F.2d at 1107. *See generally* 3 COLLIER ON BANKRUPTCY, ¶ 523.15 [1] (15th ed. 1985) (discussion of legislative intent under § 523(a)(5); 1 COWANS BANKRUPTCY LAW AND PRACTICE § 6.47, at 698-703 (1987) (same).

[40] Boddie v. Connecticut, 401 U.S. 371, 389 (1971).

[41] De Sylva v. Ballentine, 351 U.S. 570, 580 (1956).

[42] *Calhoun*, 715 F.2d at 1107.

[43] *Id.* In *In re* Spong, 661 F.2d 6, 9 (2d Cir. 1981), the court stated that Congress could not have intended that federal courts should formulate their decisions in a vacuum, precluded from all reference to state law. *Id.*

[44] *Calhoun*, 715 F.2d at 1108.

> Yet, there is little agreement as to what the vague term "guidance" actually means. Some bankruptcy courts have utilized state law to determine whether there is an underlying "obligation" to pay alimony or support in the first instance. Similarly, some courts have considered the amount of support a state court would have reasonably granted as a relevant factor in determining whether the loan assumption was actually in the nature of support. A few bankruptcy courts have also considered whether some provision is made for termination of the debtor's sole responsibility for the assumed obligation upon remarriage of the former spouse or age of majority in the children. Other bankruptcy courts have simply recited those factors most often considered relevant by state courts generally in determining whether to grant support without reference to any particular state's law. These courts have looked for factors from which they might discern either the underlying purpose of the state court decree or the actual intentions of parties in providing loan assumption by the debtor; that is, was the assumption meant to be in lieu of support payments or rather just a means of dividing property upon divorce? (citations omitted)[48]

The determination is further complicated when one considers that, in the broad sense, every assumption of a joint loan obligation or a hold harmless agreement in a divorce contributes to support at least indirectly.[49]

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[45] Hirsch & Hirsch, *supra* note 23, at 31.

[46] 661 F.2d 6 (2d Cir. 1981).

[47] *Id.* at 9. *See Calhoun*, 715 F.2d at 1108 (agrees with prevailing rationale that while state law is not binding, it provides "useful source of 'guidance' "); *In re* King, 15 Bankr. 127, 129 (Bankr. Kans. 1981) (state law provides useful guidance); *See also* Ravin & Rosen, *supra* note 9, at 12-13 (state law not binding but provides useful guidance).

[48] *Calhoun*, 715 F.2d at 1108.

[49] *Id.* at 1108-09. The dependent spouse is relieved from payments which allows the use of personal funds to provide necessary support. *Id.* at 1109.

A. *In Re Calhoun: A Landmark Decision*

One bankruptcy court, in considering the importance of the doctrine set forth in the 1983 Sixth Circuit decision *In re Calhoun*,[50] wrote that the doctrine signaled a "significant involvement of bankruptcy courts in domestic relations matters heretofore thought to fall within the sole province of the state courts."[51] Bankruptcy Judge Merrit S. Deitz, Jr., writing in *In re Helm*,[52] described *Calhoun* as an elegant formulation, probably destined for citation "as a seminal work in the new federal common law of domestic relations, but it is fraught with forebodings for bankruptcy judges and divorce practitioners."[53] *Calhoun* presents a "carefully detailed construct, a literal handbook for bankruptcy judges. There is a clean geometry about *Calhoun*."[54]

Calhoun involved a situation in which the debtor had assumed five loan obligations in a separation agreement between him and his former spouse.[55] His former wife filed a complaint to determine if the loans[56] assumed by Calhoun constituted alimony which was excepted from discharge under 11 U.S.C. § 523(a)(5).[57] The agreement characterized the loan assumption as alimony and support, although it was located in the section labeled division of property.[58] Judge Kennedy, writing for the Sixth Circuit, stated that Congress did not intend for all assumptions of joint debts to be nondischargeable; such broad interpretation of section 523(a)(5) would be at odds with the "fresh start" concept.[59] The court stated that the congressional mandate that federal bankruptcy law should be controlling, coupled with the apparent charge of Congress to the bankruptcy courts to fashion a federal bankruptcy common law of domestic relations, warranted a more searching inquiry rather than applying traditional factors borrowed from the state law.[60] The initial inquiry of a bankruptcy court, according to *Calhoun,* is whether the state court or the parties *intended* to create a support obligation through the assumption of joint debts.[61] Relevant evidence to be considered in the determination of intent might include those factors used by state courts to make a determination of intent to create support.[62] If no intent is found, the inquiry ends and the debt is dischargeable.[63] If, as a threshold matter, the bankruptcy court holds that the debt assumption was intended as support, then the court must ask whether the "assumption has the *effect* of providing the support *necessary* to assure that the daily needs of the spouse and children of the marriage are met."[64] The court should examine each loan individually to determine whether, without the loan assumption, the former spouse could not maintain such daily necessities as food, housing, and transportation.[65] If the loan assumption is not found to be necessary to sustain the former spouse and children, the obligation to hold the dependent spouse harmless is dischargeable.[66] In a footnote, Judge Kennedy stated that the court recognized that such an inquiry might modify a state court decree; however, this modification could not be avoided because of the congressional mandate to apply the federal standard.[67] The court made the distinction between a case in which support issues were litigated and a case in which the decree merely incorporated the parties' agreement.[68] In the latter, the concern for comity is less important because the agreement would effectively allow the debtor to forego his rights provided under bankruptcy laws.[69]

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[50] 715 F.2d 1103 (6th Cir. 1983).

[51] *In re* Helm, 48 Bankr. 215, 225 (Bankr. W.D. Ky. 1985).

[52] *Id.* at 215.

[53] *Id.* at 216. *Calhoun* creates a federal matrix for domestic relations law which could result in significant changes in the practice procedure before state courts, and would allow economic results which would otherwise be unattainable. *Id.*

[54] *Id.* at 220.

[55] *Calhoun*, 715 F.2d at 1105.

[56] *Id.* The obligations assumed by Calhoun included the following: 1. a note for $8670 which financed a swimming pool at the home owned by his former spouse; 2. a note for $11,000 for which the proceeds were used to consolidate the couple's debts (including Calhoun's business debts and debts for utilities and car payments); 3. credit card charges of $1076 incurred to pay for Calhoun's truck driving school expenses; 4. credit card expenses of $824 to pay for the debtor's expenses while "on the road;" 5. a $5998 note for the purchase of a van titled to Calhoun. *Id.*

[57] *Id.*

[58] *Id.* Another section which was labeled "Alimony" stated that there would be no alimony except that which was provided for in the section containing debts and obligations. *Id.* The state court incorporated the agreement into the divorce decree. *Id.*

[59] *Id.* at 1108-09.

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[60] *Id.* at 1109.

[61] *Id.*

[62] *Id.* One commentator compiled a list of factors used by courts to determine constructive intent of parties (in order of the authors's view of importance):

> 1. Whether the parties state in the document creating the debt that, within the meaning of section 523(a)(5) of the Bankruptcy Code, the obligation in question was or was not intended to be support, alimony, or maintenance.
> 2. Whether the creditor-spouse relinquished support or maintenance in exchange for the obligation at issue.
> 3. Whether the obligation ceases or diminishes on the occurrence of certain conditions, such as the remarriage of death of the spouse, or the attainment of majority age for a child.
> 4. Whether the obligation is for a certain sum payable in fixed installments or whether the amount due is "open-ended."
> 5. The parties' treatment of the obligation under tax laws, particularly if such intention is expressed in the document or order creating the obligation.
> 6. The relative financial condition of the parties and their respective earning capacity.
>   a. The age, health, work skills, and educational levels of the parties;
>   b. Whether the payment was fashioned in order to balance the disparate income of the parties;
>   c. The financial resources of each spouse, including income from employment or elsewhere;
>   d. Whether there was a need for support at the time of the decree, and whether the support award would have been inadequate absent the obligation in question;
>   e. Whether there are minor children in the custody of the creditor spouse;
>   f. The standard of living of the parties during their marriage.
> 7. The duration of the marriage;
> 8. And finally, of dubious validity, the circumstances contributing to the estrangement of the parties.

Murphy, *The Dischargeability in Bankruptcy of Debts for Alimony and Property Settlements Arising from Divorce,* 14 PEPPERDINE L. REV. 69, 75-76 (1986).

[63] *Calhoun,* 715 F.2d at 1109. The court stated that there was no basis for the bankruptcy court to create a support obligation for the debtor that the parties or the state

If the bankruptcy court determines that the obligation has the effect of providing necessary support, the next inquiry is whether the amount "is not so excessive that it is manifestly unreasonable under traditional concepts of support," considering the debtor's earning power and financial status.[70] If the loan assumption is too excessive to be considered in the nature of support, a reasonable limit on the nondischargeability must be set by the bankruptcy court, utilizing traditional state court factors.[71] According to *Calhoun*, the purpose of

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court did not create. *Id.*

[64] *Id.* The court noted certain factors might make the continuing loan assumption unnecessary, such as changes in the former spouse's capability of self-support or the existence or distribution of other property. *Id.* "Substance should prevail over form." *Id. See In re* Lineberry, 55 Bankr. 510, 516 (Bankr. W.D. Ky. 1985) (non-existence of property may make forms of support necessary).

[65] *Calhoun*, 715 F.2d at 1109. The former spouse has the burden of showing the payments are necessary for support. *In re* Costell, 75 Bankr. 348, 356 (Bankr. N.D. Ohio 1987).

[66] *Calhoun*, 715 F.2d at 1109.

[67] *Id.* at 1109 n.10.

[68] *Id.*

[69] *Id.*

[70] *Id.* at 1110. The reasonableness of the loan assumption should be examined in light of the supporting spouse's ability to pay at the time of the debts were assumed. *Id.* If there is a change of circumstances so as to make continued support inequitable, the court may consider the *current* ability to pay "insofar as it relates to the *continuing* obligation to assume joint debts." *Id.* at 1110 n.11.

[71] *Id.* at 1110. The court's determination of nondischargeability is a factual finding

the inquiry is not for the court to act as a "super divorce court," but to ensure that the decree of support does not clearly exceed the amounts which have reasonably been awarded in state court were the issue was litigated.[72]

B. *Mississippi Application of Calhoun: In Re Sullivan*

On June 20, 1986, in the United States Bankruptcy Court in the Northern District of Mississippi, Bankruptcy Judge David W. Houston, III, writing in *In re Sullivan*,[73] found persuasive the formula developed in *Calhoun*, as extended in *In re Helm*,[74] and applied the four-part test[75] to a divorce decree which was not the product of a judicial determination.[76] In *Sullivan*, the debtor and his former spouse entered into a property settlement agreement which was incorporated into the divorce decree with the joint consent of the parties.[77] The wife waived all rights to alimony.[78] The debtor agreed to assume certain obligations in excess of $38,000 annually.[79] The former spouse contended these ob-

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reviewable on appeal under the clearly erroneous standard. *Id.*

[72] *Id.* at 1110 n.12. For examples of the *Calhoun* analysis applied in bankruptcy courts within the Sixth Circuit, *see In re* Leupp, 73 Bankr. 33, 37 (Bankr. N.D. Ohio 1987) (obligation on note and second mortgage nondischargeable); *In re* Mizen, 72 Bankr. 251, 253 (Bankr. N.D. Ohio 1987) (obligation on second mortgage nondischargeable); *In re* Brock, 58 Bankr. 797, 808-09 (Bankr. S.D. Ohio 1986) (obligation of second mortgage is dischargeable); *In re* Pitzen, 73 Bankr. 10, 13 (Bankr. N.D. Ohio 1986) (joint debt to insurance company nondischargeable); *In re* Elder, 48 Bankr. 414, 417 (Bankr. W.D. Ky. 1985) (obligation on second mortgage nondischargeable); *In re* Wright, 51 Bankr. 630, 633 (Bankr. S.D. Ohio 1985) (same).

[73] 62 Bankr. 465 (Bankr. N.D. Miss. 1986).

[74] *Helm*, 48 Bankr. at 220. The court interpreted *Calhoun* as having applicability to all support cases involving 11 U.S.C. § 523(a)(5) rather than those cases involving simply assumption of debts. *Id.*

[75] *Sullivan*, 62 Bankr. at 470. The four-part test directs the court to consider whether;

> (a) the *intent* of the state court parties was to create a support obligation;
> (b) whether the support provision has the actual *effect* of providing the necessary support;
> (c) the amount of support is so excessive as to be *unreasonable* under traditional concepts of support, and finally;
> (d) if the amount of support is unreasonable, *how much* of it should be characterized as nondischargeable for purposes of bankruptcy law.

Id. at 470 (quoting *In re* Helm, 48 Bankr. 215, 220-21 (Bankr. W.D. Ky. 1985)).

[76] *Id.* at 466-67. See *In re* Holland, 48 Bankr. 874, 876 (Bankr. N.D. Tex. 1984) (application of *Calhoun* analysis within Fifth Circuit bankruptcy court).

[77] *Sullivan*, 62 Bankr. at 467.

[78] *Id.* at 468.

[79] *Id.* at 467. The debtor agreed to assume the following obligation: to pay $1350 per

ligations were nondischargeable in bankruptcy under 11 U.S.C. § 523(a)(5) because they were actually in the nature of alimony, maintenance, or support.[80] In making the determination, the court reviewed certain factual circumstances, including the former wife's remarriage, the debtor's business setbacks, his income tax returns, and his inability to assume his previous level of business activities due to serious emotional problems.[81] Upon applying the first level of analysis, the court found no intent to create a support obligation for home construction costs, debts secured by the mobile home and car, insurance for the mobile home and car, and court costs and attorney's fees.[82] Private school expenses for the children were found to be dischargeable because they were an obvious luxury and lacked the "actual effect of providing the *necessary* support."[83] The court found that the child support obligation which exceeded the debtor's total income was manifestly unreasonable, noting that the amount set by the decree was the result of an out-of-court agreement rather than a judicial determination.[84] In the

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month child support, to be adjusted according to changed circumstances at the time the house and yard were completed; to pay medical, dental, and hospitalization expenses of the minor children; to pay $16,000 per year for construction and improvement of the house and yard; to pay debts secured by the mobile home and an automobile of which the interest was transferred to the former spouse; to maintain life insurance policies for the benefits of the wife until her remarriage; to pay car and mobile home insurance; to pay the children's private school expenses, including books, fees, tuition, and uniforms. *Id.* at 467-68.

[80] *Id.* The court found that the agreement to be responsible for the costs of construction and improvement of the house and yard were clearly in the nature of a property settlement, and thus dischargeable in bankruptcy. *Id.* at 468.

[81] *Id.* at 468-69.

[82] *Id.* at 471. The majority rule is that attorney's fees are excepted from discharge since they are so tied to support that they are in the nature of support. Ravin & Rosen, *supra* note 9, at 17. Contrary results are generally based on either of two theories: 1. That the debt was to be paid to the attorney rather than the spouse and; 2. That they are deemed to be assigned claims (assigned claims are not generally dischargeable). *Id.* at 17-18. *See In re* Crist, 632 F.2d 1226, 1231 (5th Cir. 1980) (attorney's fees within ambit of alimony); *In re* Laney, 53 Bankr. 231, 232 (Bankr. N.D. Tex. 1985) (attorney's fees for children's guardian nondischargeable support). *But see In re* Skinner, 68 Bankr. 45, 47 (Bankr. W.D. Okla. 1986) (attorney's fees dischargeable because exceptions to discharge are to be narrowly construed). *See generally* Note, *Bankruptcy: Dischargeability of Divorce-Related Expenses Under 11 U.S.C. § 523 (a)(5)*, 35 OKLA. L. REV. 799, 800-05 (1982) (discussion of treatment of divorce-related attorney's fees).

[83] *Sullivan*, 62 Bankr. at 471.

[84] *Id.* at 472. The court emphasized that the amount set in the decree was the result of an out-of-court agreement rather than a judicial determination. *Id.* The court viewed the agreement as having been conceived with little practical reasoning since there was no feasible way for the debtor to honor all obligations contained in the agreement. *Id.* Since the child support payments were not set on the basis of an evidentiary hearing, Judge

final inquiry which required the court to draw the distinction between the amount of support which was reasonable and to discharge the amount which was determined unreasonable, the court held that it had the "authority to make the apportionment, particularly since there was no judicial determination as to the reasonableness of the child support award in the state court."[85]

V. OTHER TESTS APPLIED BY BANKRUPTCY COURTS WITHIN THE FIFTH CIRCUIT

In two other 1986 decisions decided in bankruptcy courts within the Fifth Circuit, *In re Bell*[86] and *In re Levy*,[87] the courts did not apply the *Calhoun* analysis to determine dischargeability under section 523(a)(5). In *In re Bell*, a Texas bankruptcy court utilized an analysis illustrative of the majority approach when the debtor failed to comply with a written agreement pursuant to divorce.[88] In determining whether the obligation constituted support or was simply a division of property, the court stated that the bankruptcy court must look beyond the characterization of the award by the state court.[89] The test is "whether the debt was incurred or its payment directed in discharge of a matrimonial obligation for alimony, maintenance, or support."[90] The court examined the underlying purpose of the divorce decree, utilizing several factors[91] employed by bankruptcy courts, and held that since it was the parties' intent to create a support obligation, the debt was nondischargeable.[92] In contrast to *Calhoun*, in the intent-factors test, the inquiry ends once the courts makes the determination of intent.

Houston did not feel the court was sitting as an appellate court, judging the merits of the decision made by the state court. *Id.*

[85] *Id.* at 474. The court noted the difficulty in drawing the distinction between the support which is reasonable and that which is unreasonable; either an obligation is for support or it is not. *Id.* The court stated that it was in the area of apportioning that support which is unreasonable for dischargeability purposes that *Calhoun* "stretches beyond the clear boundaries of the federal statute." *Id.* (court quoting *Helm*, 48 Bankr. at 225). The court stated that such apportionment could be considered only after a presentation of all relevant evidence. *Id.*

[86] 61 Bankr. 171 (Bankr. S.D. Tex. 1986).

[87] 63 Bankr. 449 (Bankr. W.D. La. 1986).

[88] *Bell*, 61 Bankr. at 173. The plaintiff claimed the debts were nondischargeable in bankruptcy under § 523(a)(5) and the defendant contended they were dischargeable as a property settlement. *Id.*

[89] *Id.*

[90] *Id.* at 175.

[91] *Id. See supra* note 62 and accompanying text.

[92] *Bell*, 61 Bankr. at 175.

Responding to the debtor's argument that he should be granted a discharge due to changed circumstances in his ability to make payments since the debt arose, the court followed the majority view in holding that the bankruptcy court may not consider changed circumstances subsequent to the support agreement.[93] The inquiry should be restricted to a determination of the nature of the obligation at the time of the divorce decree.[94] Any modification of the decree should be pursued in the state court.[95]

In *In re Levy*, a Louisiana bankruptcy court refused to expressly accept or reject the *Calhoun-Helm* line of reasoning; however, the decision indicated strong disagreement with the *Calhoun* rationale.[96] The court did not look to the amount of support the debtor could afford to pay, but only considered that the amount set by the state court was not excessive or unreasonable in terms of the recipient.[97] The court opined that to reduce or eliminate a payment of alimony to the former spouse would be "tantamount to overturning a state court decision."[98] The court viewed such a result as inappropriate for reasons of comity and practicality and, further, that a bankruptcy court was ill-equipped to make determinations of what was reasonable for the debtor to pay.[99]

VI. CIRCUIT COURTS REJECTING CALHOUN

The United States Courts of Appeals in the Second, Eighth, and Eleventh Circuits have rejected the "needs" test formulated in *Calhoun* and limit their inquiry in section 523(a)(5) non-dischargeability issues to the question of whether the obligation is "in the nature" of support.[100] The Eleventh Circuit was the first to reject the *Calhoun* rationale in *In re Harrell*,[101] a case involving post-majority child support and educational expenses not required by state law.[102] The debtor argued that the former spouse did not need the payments for support at the time the debtor filed bankruptcy under Chapter VII.[103] In holding the debt nondischargeable, the court rejected the contention that the support must be "necessary" at the time the bankruptcy petition was filed, reasoning that the statutory language does not require an inquiry to determine levels of need.[104] Further, legislative history[105] and considerations of comity[106] reinforce the court's interpretation that Congress intended only a simple inquiry as to whether the obligation was in the nature of support.[107] The court limited the bankruptcy court to its proper role,[108] one which should only impinge on state domestic relations issues in a limited manner.[109]

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[93] *Id.* at 176. *See* Ravin & Rosen, *supra* note 9, at 9-11 (overview of bankruptcy courts' treatment of changed circumstances subsequent to divorce decree).

[94] *Bell*, 61 Bankr. at 176.

[95] *Id.*

[96] *Levy*, 63 Bankr. at 450-51.

[97] *Id.*

[98] *Id.* at 451.

[99] *Id.*

[100] *See* Forsdick v. Turgeon, 812 F.2d 801, 803-04 (2d Cir. 1987) (rejected *Calhoun* as minority view; looks to intent to determine if award constituted alimony); *In re* Harrell, 754 F.2d 902, 907 (11th Cir. 1985) (statutory language and legislative history require simple inquiry into whether or not obligation is in nature of support); Draper v. Draper, 790 F.2d 52, 54 (8th Cir. 1986) (rejects relevancy of "needs" test if obligation actually in nature of support).

[101] 754 F.2d 902 (11th Cir. 1985).

One year later in *Draper v. Draper*,[110] the Eighth Circuit followed the Eleventh Circuit in rejecting the relevancy of a "needs" test.[111] The court concluded that a bankruptcy court, as a trier of fact, should base its decision on all of the facts and circumstances relevant to the intention of the parties to create a support obligation.[112]

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[102] *Id.* at 905. The debtor agreed to pay his son's college and post-graduate expenses as well as child support during this period. *Id.* at 903.

[103] *Id.* at 906.

[104] *Id.*

[105] *Id.* at 906-07. The court reasoned that the legislative history which accompanied the Bankruptcy Code stated that the inquiry is similar to bankruptcy considerations in making the determination of whether an agreement to pay money constitutes alimony or a property settlement. *Id.*

[106] *Id.* at 907. The court rejected what it perceived as the "debtor's attempt to expand the dischargeability issue into an assessment of the ongoing financial circumstances of the parties to a martial dispute" that would "embroil federal courts in domestic relations matters which should properly be reserved to the state courts." *Id.*

[107] *Id.*

[108] *Id.* The court held that the proper role of the bankruptcy court is to make a simple inquiry as to whether the obligation is in the nature of support as opposed to in the nature of a property settlement. *Id.* There is no need for an investigation into the spouse's circumstances to determine an appropriate level of need or into other circumstances which might have changed at the time the bankruptcy petition was filed. *Id.*

[109] *Id.* The court noted that in many states the parties can seek modification of the decree in state court upon a showing of changed circumstance. *Id.* at 907 n.8. For treatment by other courts within the Eleventh Circuit *see In re* Holt, 40 Bankr. 1009, 1012 (S.D. Ga. 1984) (obligation payable to third parties dischargeable if not support); *In re* Graves, 69 Bankr. 626, 627-28 (Bankr. S.D. Fla. 1987) (present income of debtor not considered in dischargeable determination); *In re* Markizer, 66 Bankr. 1014, 1018-19 (Bankr. S.D. Fla. 1986) (payments to former spouse dischargeable although in lieu of alimony); *In re* Delaine, 56 Bankr. 460, 465 (Bankr. N.D. Ala. 1985) (court need only make simple inquiry as to whether obligation is in nature of support).

[110] 790 F.2d 52 (8th Cir. 1986).

[111] *Id.* at 54.

In its 1987 decision in *Forsdick v. Turgeon*,[113] the Second Circuit rejected the debtor's argument that the court should take note of the changed circumstances of the parties, under the *Calhoun* inquiry, as well as the fact that the former spouse no longer required the support.[114] The court found there was no clear mandate from Congress to interfere with state-crafted family law mechanisms.[115] The court read section 523(a)(5) alongside section 523(a)(8), which treats school loans as nondischargeable unless "excepting such loan from discharge will impose undue hardship on the debtor and the debtor's dependents."[116] The court concluded that section 523(a)(5) constitutes an absolute exception from discharge since Congress did not mandate the consideration of present circumstances as in section 523(a)(8).[117] Finally, the court stated that to fall within the exception to discharge, the award for support did not have to conform to a level that a bankruptcy judge might determine necessary for maintenance; it need only be in the nature of support.[118]

VII. TREATMENT OF 523(A)(5) LITIGATION BY OTHER COURTS

The majority of bankruptcy courts have found it appropriate to apply some version of an intent-factors test to determine the nature of a support obligation.[119] The test applied by the Tenth Circuit in *In re Yeates*[120] is illustrative of one approach which emphasizes the language of the agreement. In rejecting the "duty of support" test,[121] the *Yeates* court stated that the initial inquiry of the bankruptcy court must be to determine the intent of the parties at the time of the agreement, considering the surrounding circumstances.[122] The parties' written agreement is persuasive evidence of intent; therefore, if the intent is clear on the face of the written agreement, that characterization of the obligation will control.[123] If the agreement is ambiguous, the court must look to extrinsic evidence to determine intent as well as the characterization of the obligation, considering such factors as a former spouse's need for support at the time of the agreement.[124]

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[112] *Id.*

[113] 812 F.2d 801 (2d Cir. 1987).

[114] *Id.* at 803.

[115] *Id.* at 804. The court reasoned that it is clear Congress intended to protect support rights of the former spouse at the expense of the debtor's fresh start. *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.* The court did not believe that the bankruptcy court should consider changed conditions for modification purposes when state court modification is unavailable to the parties. *Id.* The court did not deem that factor persuasive because the "decision not to make modification available to the obligated spouse" reflected state-made policy in domestic relations, an area in which the court was "loathe to intrude." *Id.*

[119] Ravin & Rosen, *supra* note 9, at 7-8.

[120] 807 F.2d 874 (10th Cir. 1986).

[121] *Id.* at 878. The "duty of support" test required the court to ask whether the debtor owed his former spouse a "duty of support under the law of the state at the time of the divorce." *Id.* This test was not considered appropriate because it allowed state law to control the issue of dischargeability. *Id.*

In *In re Altavilla*,[125] a bankruptcy court within the First Circuit did not find persuasive labels used by the divorce court or the parties to indicate an award for support;[126] the label was only one of the factors to be considered in determining intent.[127] Within the Fourth Circuit, one bankruptcy court compiled a comprehensive list of factors of which the state court label of the award was merely one factor to be considered for determining intent.[128] In *In re Long*,[129] the Fourth Circuit deferred to the intent conclusion of a state court jury which determined the award to be alimony and, therefore, the award was nondischargeable in bankruptcy.[130]

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[122] *Id. See* Shaver v. Shaver, 736 F.2d 1314, 1316 (9th Cir. 1984) (initial inquiry of bankruptcy court is to determine intention of parties at time of agreement); Boyle v. Donavan, 724 F.2d 681, 683 (8th Cir. 1984) (same); *In re* Crist, 632 F.2d 1226, 1229 (5th Cir. 1980) (court must examine substance of agreement "viewed in the crucible of the surrounding circumstances").

[123] *Yeates*, 807 F.2d at 878. *See In re* Gebhart, 53 Bankr. 113, 115 (W.D. Mo. 1985) (where decree is unambiguous as to intent, court must not overlook purpose by relying on party's disability or need for support; debt is dischargeable).

[124] *Yeates*, 807 F.2d at 878. *See In re* Lightner, 77 Bankr. 274, 276-77 (Bankr. D. Mont. 1987) (agreement between parties will control if clear; look to intent of the parties and substance of agreement, if ambiguous).

[125] 40 Bankr. 938 (Bankr. D. Mass. 1984).

[126] *Id.* at 941. *See In re* Williams, 703 F.2d 1055, 1057-58 (8th Cir. 1983) (labels used by parties or divorce court not conclusive, but evidence of parties' and court's intention); *Shaver*, 736 F.2d at 1316-17 (labels not determinative of intent).

[127] *Altavilla*, 40 Bankr. at 941.

[128] *See In re* Coffman, 52 Bankr. 667, 675 (Bankr. D. Md. 1985) (debt characterization one factor to be considered). The court in *Coffman* compiled the factors to serve as a guide to the bankruptcy court in distinguishing between alimony or support and a property settlement. *Id.* at 674. The list includes the following factors:

1. Whether there was an alimony award entered by the state court.
2. Whether there was a need for support at the time of the decree; whether the support award would have been inadequate absent the obligation in question.
3. The intention of the court to provide support.
4. Whether debtor's obligation terminates upon death or remarriage of the spouse or a certain age of the children or any other contingency such as a change in circumstances.
5. The age, health, work skills, and educational levels of the parties.
6. Whether the payments are made periodically over an extended period or in a lump sum.
7. The existence of a legal or moral "obligation" to pay alimony or support.

The Seventh Circuit has chosen a more stringent application of the intents-factor test as indicated in *In re Woods*[131] and, more recently,in *In re Britton.*[132] One distinction made by these courts is how directly or indirectly benefited is the dependent spouse by the payments provided for in the agreement.[133] Therefore, if the dependent spouse benefited too indirectly, such as in an agreement to pay off the mortgage on a marital residence, the benefit would be interpreted as

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8. The express terms of the debt characterization under state law.
9. Whether obligation is enforceable by contempt.
10. The duration of the marriage.
11. The financial resources of each spouse, including income from employment or elsewhere.
12. Whether the payment was fashioned in order to balance disparate incomes of the parties.
13. Whether the creditor spouse relinquished rights of support in payment of the obligation in question.
14. Whether there were minor children in the care of the creditor spouse.
15. The standard of living of the parties during their marriage.
16. The circumstances contributing to the estrangement of the parties.
17. Whether the debt is for a past or future obligation, any property division, or any allocation of debt between the parties.
18. Tax treatment of the payment by the debtor spouse.

Id. at 674-75. *See also In re* Benich, 811 F.2d 943, 945 (5th Cir. 1987) (monthly payment to ex-wife labeled property settlement was nondischargeable support).

[129] 794 F.2d 928 (4th Cir. 1986).

[130] *Id.* at 931. In *Long*, the jury awarded $65,000 to the wife in a divorce proceeding. *Id.* at 929. The trial judge instructed the jury with regard to the law for making a division of property as well as the law for granting alimony. *Id.* The award was listed as alimony as part of a special verdict form prepared by the jury. *Id.* The holding in *Long* supports the distinction made by Judge Houston in *Sullivan.* In *Sullivan,* the court was more willing to examine the reasonableness of the support and discharge that amount which was determined to be unreasonable, particularly because there had been no judicial determination since the award was the result of an agreement by the parties which was incorporated into the divorce decree. *Sullivan,* 62 Bankr. at 474. *See also In re* Radin, 57 Bankr. 346, 347 (Bankr. S.D. Fla. 1986) (fully litigated state court divorce decree should not be second-guessed by bankruptcy judge sitting as "super-divorce court").

[131] 561 F.2d 27, 29-30 (7th Cir. 1977).

[132] 51 Bankr. 323 (Bankr. N.D. Ind. 1985).

[133] *Id.* at 325. The court held that the former wife's assumption that the state court intended for her to have a life-long residence was incorrect. *Id.* The payment of the mortgage by the debtor on the marital residence benefited her too indirectly to constitute alimony or support, despite the fact there was a wide discrepancy in income and the former wife was partially disabled at the time of the divorce. *Id.* at 325-26.

too tenuous to be support or alimony and thus be dischargeable.[134]

Within the Third Circuit, bankruptcy courts have applied both the intent-factors test and the *Calhoun* test. In *In re MacDonald*,[135] the court applied the *Calhoun* reasoning in finding nondischargeable an obligation by a debtor to reimburse or indemnify the former spouse to the extent she was required to pay the joint debts.[136] In *In re Toste*,[137] the court applied the intent-factors test, and looked only to the decree of divorce to determine state court intent.[138] Since the decree expressly provided that attorney's fees were nondischargeable in bankruptcy, the court presumed the state court judge intended that the payment of a mortgage be dischargeable as a property settlement.[139]

VIII. Res Judicata and Collateral Estoppel Under 523(a)(5)

Bankruptcy courts were given exclusive jurisdiction to determine dischargeability for exceptions to discharge under sections 523(a)(2), (4), and (6) when the creditor requests the determination.[140] To determine dischargeability of alimony and support under section 523(a)(5), concurrent jurisdiction exists with the state courts and the federal bankruptcy courts.[141] Since the bankruptcy courts do not have exclusive jurisdiction under section 523(a)(5), the doctrines of res judicata and collateral estoppel may apply.[142]

The doctrine of res judicata bars relitigation of all questions which were actually litigated or could have been brought in the previous suit.[143] Collateral estoppel applies when the "precise issue in the later proceedings [must] have been raised in the prior proceeding,. . . the issue was actually litigated and . . . the determination was necessary to the [final] outcome."[144] Both doctrines apply only when the party against whom it is now asserted had a "full and fair opportunity" to litigate the issue.[145] One commentator stated that res judicata and collateral estoppel will generally be applied to section 523(a)(5) litigation if the record adequately reflects a balancing of the two competing principles; the debtor's need for a "fresh start" and the need of the family for support.[146]

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[134] *Id.* at 325-26.

[135] 69 Bankr. 259 (Bankr. D.N.J. 1986).

[136] *Id.* at 268, 278.

[137] 62 Bankr. 131 (Bankr. D.N.J. 1986).

[138] *Id.* at 133-34.

[139] *Id.* at 134.

[140] Section 523(c) states:

> Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.

11 U.S.C. § 523(c) (1982 & Supp. 1986); *see* Ravin & Rosen, *supra* note 9, at 26 (bankruptcy court has exclusive jurisdiction to determine dischargeability of debts under § 523(a)(2), (4), and (6)).

[141] 3 Collier on Bankruptcy ¶ 523.15 (15th ed. 1985).

[142] *In re* Pigge, 539 F.2d 369, 371-73 (4th Cir. 1976). *See*, Ravin & Rosen, *supra* note 9, at 26.

The *Helm* court stated that the *Calhoun* analysis foreshortens the use of collateral estoppel as an instrument of finality.[147] Unless the precise *Calhoun* standard was used by the state court in awarding alimony, maintenance or support, the doctrine of collateral estoppel should not be imposed.[148]

IX. CONCLUSION

In litigation involving dischargeability of a debtor's support obligations owed to his former family, two strong public policy considerations collide: the debtor's right to a fresh start under bankruptcy law and the debtor's duty to support his family as established by the Supreme Court and by state law. Domestic relations law has long been an area within the exclusive domain of the states. With the enactment of the Bankruptcy Code into positive law, Congress has made it clear that in determining whether an obligation is support and, therefore, dischargeable, the bankruptcy judge should no longer rely solely upon state law, but should engage in a new analysis based upon federal law. Some courts have interpreted this congressional directive as a mandate to fashion a new federal common law of domestic relations. Other courts have been hesitant to assume the role of a "super-divorce court" and intrude into areas involving sensitive family law mechanisms and state-made policies.

Two separate lines of analysis have developed in bankruptcy courts within the Fifth Circuit. Some courts, as reflected in *In re Bell* and *In re Levy*, limit their inquiry to the question of whether it was the intent of the parties or the state court to establish a support obligation. The intent is determined by examining a variety of factors applied by state courts in making a support award. The intent-factors test appears to broadly construe the exception to discharge and favors the "duty to support" policy because once the determination is made, the inquiry ends.

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[143] Montana v. United States, 440 U.S. 147, 153 (1979).

[144] Spilman v. Harley, 656 F.2d 224, 228 (6th Cir. 1981).

[145] Kremer v. Chemical, 456 U.S. 461, 481 n.22. (1982).

[146] Ravin & Rosen, *supra* note 9, at 29.

[147] *Helm*, 48 Bankr. at 220.

[148] *Id.*

In a separate line of reasoning formulated by the Sixth Circuit in *In re Calhoun*, and adopted in *In re Sullivan*, a bankruptcy court engages in a further inquiry as to the amount of support necessary at the time the bankruptcy petition is filed, discharging that amount deemed by the court to be unreasonable. The *Calhoun* test appears to apply a narrower construction of the exception to discharge and favors the policy of providing a fresh start for the debtor. The effect of *Calhoun* is the modification of a state court judicial decree by a federal bankruptcy court. In *Sullivan*, Judge Houston drew out distinction between a decree which was the result of a judicial determination of the state court as opposed to one which merely incorporated the agreement of the parties. Such a distinction as to the willingness of a bankruptcy court to interfere in the sanctity of a state court judicial decree may be illusory when one considers that, according to Mississippi State Board of Health statistics, of the 12,871 divorces in Mississippi in 1986, only 963 were contested divorces which would be protected from re-examination and modification by a bankruptcy court. What can be gleaned from the application of *Calhoun* in *Sullivan* is Judge Houston's willingness to re-examine and apportion the obligation where it was manifestly unreasonable and far exceeded the debtor's ability to pay at the time the payments were agreed upon.

In determining issues of dischargeability under section 523(a)(5), a bankruptcy court is called upon to balance competing policies and interests and draw a fine line between what constitutes a support obligation as opposed to a property settlement. Under the *Calhoun* analysis, the bankruptcy court must draw a further line between what is reasonable and unreasonable support for dischargeability purposes.

From the standpoint of a careful domestic relations practitioner, one answer is to litigate support issues in the more favorable state forum when bankruptcy of the debtor spouse is anticipated. Three circuits have thus far rejected the *Calhoun* line of reasoning. It remains to be seen whether the Fifth Circuit will also reject the controversial guidelines established in *Calhoun*.

Karen DeMetz Luster

RECENT DECISIONS

PERSONAL JURISDICTION — MINIMUM CONTACTS — EXECUTION OF A LEGAL DOCUMENT WITHIN THE STATE SATISFIES MINIMUM CONTACTS STANDARD FOR PERSONAL JURISDICTION

Plaintiff[1] brought suit against the defendant[2] in the Chancery Court of Lamar County to have a gift of land set aside[3] or, in the alternative, reformed.[4] The plaintiff/donor, a Mississippi resident,[5] had conveyed the land to a resident of Louisiana[6] by a document executed and notarized in Mississippi.[7] The nature and extent of this gift formed the basis of the subsequent dispute.[8] The bill of complaint invoked the

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[1] The plaintiff, Mrs. Edwina Ford Anderson, was the donor of several tracts of land amounting to more than 210 acres. Anderson v. Sonat Exploration Co., 523 So. 2d 1024, 1025 (Miss. 1988).

[2] *Id.* The defendant/donee, Mrs. Anita Ford Rudolph, was a niece to whom the plaintiff had conveyed the property. *Id.*

[3] *Id.* The plaintiff had conveyed her entire interest in the lands in question to her niece by a document which declared itself on its face to be a "donation inter vivos." *Id.* In seeking to set aside this gift, the donor alleged that the donee had misrepresented the nature and the legal consequences of the instrument which effected the transfer. *Id.*

[4] *Id.* In the alternative the plaintiff sought to have the transaction reformed in accordance with her actual intent at the time of the transfer. *Id.* The donor asserted that she had intended to convey only part of the estate and to retain for herself the mineral rights. *Id.*

[5] *Id.* At the time of the transaction, Mrs. Anderson lived in Lamar County, Mississippi. *Id.*

[6] *Id.* Mrs. Rudolph, the donee, resided in Angie, Louisiana, at the time of the events which gave rise to the action. *Id.*

[7] *Id.* The defendant presented the plaintiff with a document drawn by the defendant's attorneys in Louisiana. *Id.* The plaintiff then went with the defendant and her husband to the office of the chancery clerk in Purvis, Mississippi, where the instrument of transfer was duly executed and notarized by the deputy chancery clerk. *Id.*

[8] *Id.* Bound up in the dispute over the conveyance was the controverted allegation of the donor's intent. *See supra* note 4.

Mississippi long-arm statute as the jurisdictional basis for the suit.[9] In a special appearance, the defendant moved to dismiss for lack of personal jurisdiction.[10] The chancellor sustained the defendant's motion and dismissed the action.[11] On appeal,[12] the Mississippi Supreme Court, *held*, affirmed in part,[13] reversed in part,[14] and remanded.[15]

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[9] *Id.* The statute provides in pertinent part: "Any non-resident person . . . who shall . . . commit a tort in whole or in part in this state against a resident . . . shall by such act or acts be deemed to be doing business in Mississippi." MISS. CODE ANN. § 13-3-57 (Supp. 1986). The plaintiff alleged that the defendant's action fell within the statute because it amounted to the act of deceit. *Anderson*, 523 So. 2d at 1025. If the misrepresentation had occurred as alleged, the court reasoned, the defendant had committed a tort in part within the state, thus coming under the jurisdiction conferred by the statute. *Id.*

[10] *Anderson*, 523 So. 2d at 1025.

[11] *Id.*

[12] *Id.* at 1025-26. In appealing the chancellor's decree, the plaintiff/appellant asserted that the foreign defendant had satisfied jurisdictional requirements by executing a document within the state. *Id.* The defendant contested jurisdiction, maintaining that her contacts with the state had been "random," "fortuitous," and "attenuated." *Id.* Such an association, the defendant contended, fell short of the minimum contacts standard required for personal jurisdiction. *Id.*

[13] *Id.* at 1028. The court affirmed the chancellor's ruling on a collateral issue, that of attachment of mineral royalties from certain lands in Mississippi. *Id.* These royalties were payable to the defendant. *Id.* at 1025. The plaintiff had joined as a codefendant the Sonat Exploration Co., as the payor of the royalties, and had applied for the provisional remedy of attachment as a means of securing resources from which the judgment might be satisfied. *Id.* The chancellor initially ordered this attachment. *Id.* On the defendant's special appearance, and in response to her motion, however, he subsequently dissolved the attachment. *Id.* The Mississippi Supreme Court affirmed this dissolution because the affidavit supporting the petition of attachment failed to comply with the state's attachment statute in two respects: (1) it failed to demonstrate that the royalties were the only means of satisfying the judgment, and (2) it contained no specific statement of damages. *Id.* at 1027-28.

[14] *Id.* at 1028. The court reversed the chancellor's dismissal for lack of jurisdiction. *Id.* In addition to its holding on the salient issue of the case, that of the constitutional sufficiency of the defendant's contacts with the state, the court found jurisdiction to be adequate in two other respects. *Id.* at 1026-27. First, before reaching the constitutional issue, the court determined that the chancery court did have jurisdiction over the Louisiana defendant. *Id.* at 1025-26. The court stated that if the allegation of deceit were true, the defendant had committed a tort, at least in part, within the state. Thus the allegation of tortious conduct brought the defendant within the reach of the statute. *Id.* at 1025-26. Second, on the issue of subject matter jurisdiction, the court held that the Chancery Court of Lamar County did have jurisdiction, even though the land in question was in Louisiana. *Id.* at 1027. The defendant had successfully contested both personal and subject matter jurisdiction in the chancery court, but the Mississippi Supreme Court held that the action involved a dispute between parties, and not an attempt to try title to land. *Id.* The location of the land within a neighboring state would present a choice of law issue, the court reasoned, and not a jurisdictional defect. *Id.*

When an out-of-state resident whose contacts are otherwise insufficient avails herself of the services of the forum state by officially executing a document within that state, she has established adequate minimum contacts to satisfy constitutional requirements for personal jurisdiction. *Anderson v. Sonat Exploration Co.*, 523 So. 2d 1024 (Miss. 1988).

The constitutional requirement of minimum contacts was the product of a relatively modern stage in the evolution of the theory of personal jurisdiction.[16] Traditional bases of personal jurisdiction have included such concepts as relationship,[17] the power of the state,[18] and fairness.[19] Although little trace of the relationship basis for jurisdiction remains today,[20] the power rationale has persisted and survives in several forms.[21] The notion of power as a basis for jurisdiction found full

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[15] *Id.* at 1028. Having found the chancellor's assertion of jurisdiction to be proper in every respect, the court remanded the case for trial on the merits. *Id.*

[16] Von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U.L. Rev. 279, 279-303 (1983).

[17] *Id.* at 283. This concept was an outgrowth of the medieval relationship between tenant and lord, an integral part of the feudal structure. *Id.* In an affiliation analogous to that of the citizen with the state, the tenant depended on the lord for the administration of justice. *Id.* With the rise of nationalism, this basis of jurisdiction resurfaced in the personal allegiance of the subject to the head of the state. *Id.*

[18] *Id.* According to the power theory, the state has authority over a person so long as it actually has power over him. *Id.* at 285. This view rests on a literal basis when the state serves process on an individual within the territorial confines of the state. *Id.* The power principle reaches a theoretical dimension, however, when the state exerts authority over its citizens who are temporarily absent. *Id.* Other abstract extensions of this concept are the jurisdictional bases of "presence" and "consent." *Id.* Because of difficulties in the application of the consent theory, it gradually receded in importance, yielding to the more manageable presence theory. *Id.* at 299. Although it was more securely founded on logic, even this theory became strained when "presence" was taken to mean "doing business," as in the case of corporations. *Id.*

[19] *Id.* at 283. *See generally* Martin, *Constitutional Limitations on Choice of Law*, 61 Cornell L. Rev. 185, 192 (1976) (emergence of reasonableness standard); von Mehren, *supra* note 16, at 287-90 (balancing function of fairness standard). The varying aspects of "fairness" often appear in discussions by courts and commentators under the general rubric of "reasonableness." *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (factors establishing reasonableness); Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 Cornell L. Rev. 411, 416-23 (1981) (shift to reasonableness standard).

[20] Von Mehren, *supra* note 16, at 284. A vestige of this idea remains in the French custom of predicating jurisdiction on nationality. *Id.*; *see* Code civil arts. 14, 15 (Fr.) (jurisdiction over French nationals).

[21] Clermont, *supra* note 19, at 413; *see* Seidelson, *A Supreme Court Conclusion and Two Rationales That Defy Comprehension:* Asahi Metal Indus. Co., Ltd. v. Superior Court of California, 53 Brooklyn L. Rev. 563, 569 (1987) (longevity of theory of jurisdiction based on territorial sovereignty); Comment, *Giving the Boot to the Long-Arm:*

expression in the territorial sovereignty concept which the Supreme Court proclaimed in *Pennoyer v. Neff*.[22] The *Pennoyer* case resolved a dispute which arose after an Oregon court decreed that land belonging to a nonresident defendant be attached to satisfy a debt.[23] Analyzing jurisdiction in terms of due process,[24] the Court declared that the state had no authority over nonresidents beyond its borders.[25]

In 1945, with the landmark decision of *International Shoe Co. v. Washington*,[26] the Court began a radical departure from the doctrine of *Pennoyer*.[27] The defendant in *International Shoe* was a corporation[28] which had attempted to avoid paying unemployment contribu-

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Analysis of Post-International Shoe Supreme Court Personal Jurisdiction Decisions, Emphasizing Unrealized Implications of the "Minimum Contacts" Test, 75 Ky. L.J. 885, 892-93 n.20 (1987) (recent casebook treatment of transient presence as valid basis for personal jurisdiction).

A federal district court case, Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959), exemplified the use of physical power as a means of establishing jurisdiction. Von Mehren, *supra* note 16, at 291. In *Grace*, the party being served came under the sway of the court when the airplane in which he was a passenger crossed the air space above the area served by the court. *Grace*, 170 F. Supp. at 444-50.

[22] 95 U.S. 714, 722 (1877).

[23] *Id.* at 715-16.

[24] Seidelson, *supra* note 21, at 568. According to the *Pennoyer* analysis of due process, the constitutional right depended upon the territorial boundaries of the states. Seidelson, *supra* note 21, at 568. The philosophical source of the Court's due process analysis was anomalous, however, as Justice Field built his rationale on the thinking of French and Dutch scholars, not on the constitutional concept of due process. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 Nw. U.L. Rev. 1112, 1116 (1981).

[25] *Pennoyer*, 95 U.S. at 722-23; *see* Gottlieb, *In Search of the Link Between Due Process and Jurisdiction*, 60 Wash. U.L.Q. 1291, 1291-1300 (1983) (dominance of power theory); Welkowitz, *Beyond Burger King: The Federal Interest in Jurisdiction*, 56 Fordham L. Rev. 12 n.7 (1987) (sovereign power based on territoriality).

[26] 326 U.S. 310 (1945).

[27] *See* von Mehren, *supra* note 16, at 302-04 (birth of alternate theory of jurisdiction in *International Shoe*). As society had grown more complex and mobile, the concept of territoriality could no longer provide a rational theory for personal jurisdiction. *See* Hovenkamp, *Personal Jurisdiction and Venue in Private Antitrust Actions in the Federal Courts: A Policy Analysis*, 67 Iowa L. Rev. 485, 488 (1982) (renovation of personal jurisdiction to accommodate mobile society); *see also* Note, *Minimum Contacts: Only One Part of the Personal Jurisdiction Analysis*, 52 Mo. L. Rev. 715, 719 (1987) (prior jurisdictional standards not as effective because of "prevalence of multi-state transactions").

[28] *International Shoe*, 326 U.S. at 311. When based on the idea of presence, the power theory was difficult to sustain in the case of a corporate defendant. *See* Note, *Bauxites' "Individual Liberty Interest" and the Right to Control Amenability to Suit in Personal Jurisdiction Analysis*, 51 Fordham L. Rev. 1278, 1279 (1983) (difficulties in determining presence of corporations for purposes of jurisdiction). Since a corporate en-

tions in the state of Washington.[29] Although some of the company's salesmen operated within that state, the company had limited the scale of its operation by locating its offices and supervisory personnel elsewhere.[30] In spite of the paucity of the company's official contacts with the state, the Supreme Court upheld the state's right to exercise jurisdiction over the corporate defendant.[31] In accordance with traditional thinking,[32] the Court analyzed the amenability of a defendant to jurisdiction in terms of his due process rights.[33] There would be compliance

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tity could operate through various identities and in different areas, it was obviously difficult to fix the location of its actual presence. *Id.* Such a conceptual problem made the emergence of a new theory inevitable. *Id.* at 1279-80.

[29] *International Shoe*, 326 U.S. at 311-12. It is possible that, in addition to the obvious issue of personal jurisdiction, the Court's "hidden agenda" included a policy concern about the state's interest in collecting taxes. McDermott, *Personal Jurisdiction: The Hidden Agendas in the Supreme Court Decisions*, 10 Vt. L. Rev. 1, 7-8 (1985).

[30] *International Shoe*, 326 U.S. at 313-14.

[31] *Id.* at 320-21.

[32] *See* Seidelson, *supra* note 21, at 568-69 (initial implementation of due process clause as rationale for jurisdiction in *Pennoyer*). In Supreme Court expositions of constitutional law, pronouncements on personal jurisdiction amount to interpretations of due process. Redish, *supra* note 24, at 1113.

[33] *International Shoe*, 326 U.S. at 316. *International Shoe* established the modern version of the due process limitation on jurisdiction. Note, Burger King Corp. v. Rudzewicz: *Flexibility v. Predictability in In Personam Jurisdiction*, 64 N.C.L. Rev. 880, 885 (1986). A particularly troublesome element in the Supreme Court's due process analysis, in *International Shoe* and in other opinions as well, has been the persistent notion of federalism. Redish, *supra* note 24, at 1113-16. Although Justice Field had infused the federalism theory into his analysis of due process in *Pennoyer*, a logical relationship between the two concepts was lacking. *Id.* at 1116. The idea persisted, however, and this principle continued to influence judicial thinking in later opinions such as *International Shoe*, despite the fact that this landmark opinion was notable for having spawned the fairness standard. *See* Weintraub, *Due Process Limitations on the Personal Jurisdiction of State Courts: Time for a Change*, 63 Or. L. Rev. 485, 488-89 (1984) (concept of Federalism in context of personal jurisdiction was one source of constitutional restrictions espoused by Court). In World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980), Justice White termed the due process clause, "an instrument of interstate federalism," in what many have considered an adherence to the flawed rationale of earlier opinions. *See* Redish, *supra* note 24, at 1114 (lack of constitutional basis for federalism); Weintraub, *supra*, at 486 (federalism component as obstacle to resolution of due process problems); Welkowitz, *supra* note 25, at 29 n.170 (due process analysis improperly founded on state sovereignty).

In some decisions the Court has found the state's interest to be such a weighty consideration as to tilt the balance in the outcome of the case. *See* Kulko v. Superior Court, 436 U.S. 84, 90-101 (1978) (state's interest in ensuring child support); McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957) (state's interest in providing redress for resident insureds); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 312-14 (1950) (state's interest in regulating rights of trustees and beneficiaries).

with due process, according to the Court, if the defendant had "certain minimum contacts"[34] with the state, so as not to offend "traditional notions of fair play and substantial justice."[35] Although on the surface the decision seemed to allow the state court jurisdiction over a relatively remote defendant whose association with the state was tenuous,[36] the Court focused on the fact that the dispute was directly related to the defendant's activities.[37] In addition, the Court emphasized the systematic and continuous nature of the corporation's contacts with the state.[38]

Although subsequent opinions have tended to quantify the contacts with the forum state,[39] the Supreme Court in *International Shoe*

In Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-03 & n.10 (1982), the Court clarified its position on due process somewhat by removing state sovereignty interests from the purview of the fourteenth amendment. A central feature of the reasoning in this case was the due process analysis, in which the Court reasserted the validity of the minimum contacts standard and rejected federalism as a proper function of due process. *Id.* at 703 n.10. The interest to be protected, according to Justice White in the *Bauxites* opinion, was the individual liberty interest. *Id.* at 702; *see* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 807 (1985) (protection of individual liberty interest).

[34] *International Shoe*, 326 U.S. at 316.

[35] *Id.* (citing Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

[36] McDermott, *supra* note 29, at 35.

[37] *International Shoe*, 326 U.S. at 319-20. This factor has operated as a counterpoise in subsequent opinions. McDermott, *supra* note 29, at 39.

[38] *International Shoe*, 326 U.S. at 320.

[39] Stephens, *The Single Contract as Minimum Contacts: Justice Brennan "Has It His Way"*, 28 WM. & MARY L. REV. 89, 98 (1986); *see* Comment, Asahi Metal Industry v. Superior Court: *The Stream of Commerce Doctrine, Barely Alive But Still Kicking*, 76 GEO. L.J. 203, 206 (1987) [hereinafter Comment, *Asahi Metal Industry*] (flexibility of qualitative evaluation in *International Shoe*). The Court qualified the requirement that the contacts must be systematic and continuous in Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 413-19 (1984). Note, *Quest for a Bright Line Personal Jurisdiction Rule in Contract Disputes* — Burger King Corp. v. Rudzewicz, 105 S. Ct. 2174 (1986), 61 WASH. L. REV. 703 (1986). According to *Helicopteros*, the defendant's activities must have occurred on a sustained basis where the cause of action was unrelated to his conduct. *Helicopteros*, 466 U.S. at 414.

In explaining this shifting standard, Justice Blackmun applied the term "specific" to jurisdiction over a cause of action stemming from the defendant's activities within the forum state. *Id.* at 414 n.8. The state might assert "general" jurisdiction, on the other hand, where the cause of action had arisen independently. *Id.* at 414 n.9. Since the advent of the constitutional standard of minimum contacts, specific jurisdiction has become more prevalent. Comment, *supra* note 21, at 897.

Because of the pliability of the standard, it has been possible to exercise jurisdiction where the defendant's contact with the state has consisted of a single transaction. Note, *supra* note 39, at 716; *see* Calder v. Jones, 465 U.S. 783, 789 (1983) (jurisdiction from effect of contact); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 779-80 (1983) (slight stressed the nature of the contacts.[40] The *International Shoe* decision has been acclaimed for its effectiveness in displacing the anachronistic doctrine of *Pennoyer*, with its reliance on the principle of territorial power.[41] The minimum contacts theory also signaled a shift toward the fairness standard as a basis for personal jurisdiction.[42] In adopting such a standard, the Court weighed considerations of convenience, fairness, and justice.[43] Within this general context of fair play and substantial justice, the minimum contacts criterion remains the operative standard for the Supreme Court's determination of the limits of personal jurisdiction.[44]

In *Hanson v. Denckla*,[45] the Court checked the expansion of jurisdiction which had continued in the years after *International Shoe*. In *Hanson* the Court held that Florida could not exercise jurisdiction over a Delaware trustee, even though the settlor of the trust and most of its appointees and beneficiaries resided in Florida.[46] The *Hanson* court refined its minimum contacts standard by requiring that the defendant

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contact sufficient with derivative cause of action); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 448 (1952) (jurisdiction allowed over unrelated dispute because of business contact); Thompson v. Chrysler Motors Corp., 755 F.2d 1162, 1172 (5th Cir. 1985) (sufficiency of single contact). In McGee v. International Life Ins. Co., 355 U.S. 220, 221-22 (1957), the Supreme Court allowed a state's long-arm statute to stretch to the constitutional limit by upholding California's jurisdiction over a Texas defendant whose sole contact with California was a life insurance policy it issued on the life of a California resident. Comment, *Asahi Metal Industry*, *supra*, at 207. *See generally* Comment, 29 Miss. L.J. 91, 97-101 (1957) (prediction that single transactions can sustain jurisdiction); von Mehren & Trautman, *Jurisdiction to Adjudicate*, 79 Harv. L. Rev. 1121, 1144-63 (1966) (specific jurisdiction through isolated contacts).

[40] *International Shoe*, 326 U.S. at 319; *see* Stephens, *supra* note 39, at 98 (emphasis on quality rather than quantity).

[41] *See* Redish, *supra* note 24, at 1113 (departure from *Pennoyer* theory). It should be noted that *International Shoe* disposed of only the second component of the *Pennoyer* principle. *Id.* at 1115-17. The first tenet, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory, remains viable; but the second, that no State can exercise direct jurisdiction and authority over persons or property without its territory, is no longer extant. *Id.* at 1116-17, 1117 n.35.

[42] Von Mehren, *supra* note 16, at 302-03.

[43] *Id.*; *see* Travelers Health Assn. v. Commonwealth of Virginia, 339 U.S. 643, 649 (1950) (jurisdiction predicated on considerations of fairness); Fisher Governor Co. v. Superior Court, 53 Cal. 2d 222, 225-26, 1 Cal. Rptr. 1, 3-4, 347 P.2d 1, 3-4 (1950) (listing factors applied in determining fairness); Martin, *supra* note 19, at 203-04 (burden on litigants and forum's interest in litigation were important factors); Weintraub, *supra* note 33, at 522-23 (minimum contacts standard should be abandoned in favor of fariness approach).

[44] Clermont, *supra* note 19, at 424.

[45] 357 U.S. 235 (1958).

[46] *Id.* at 254.

purposefully avail himself of the services of the forum state.[47] The Court also denied the validity of a contact accomplished through the "unilateral activity"[48] of a third party.[49]

The Mississippi Supreme Court explicitly deferred to the constitutional mandate in *Breckenridge v. Time, Inc.*[50] In *Breckenridge* the plaintiff sued the publishing company, Time, Inc., in libel for publishing his picture with an accompanying derogatory caption.[51] The defendant publishing company contested jurisdiction, maintaining that the company's contacts did not reach the level of "doing business."[52]

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[47] *Id.* at 253.

[48] *Id.* The trustee had not sought to establish or maintain any ties with the state of Florida. *Id.*

[49] *Id.*

[50] 253 Miss. 835, 842-44, 179 So. 2d 781, 783-84 (1965).

[51] *Id.* at 838-39. The alleged defamation occurred almost simultaneously with the enactment of the amended long-arm statute, MISS. CODE ANN. § 1437 (Supp. 1964), which provided that the formation of a contract or the commission of a tort within the state would be an instance of "doing business." MISS. CODE ANN. § 1436 (Supp. 1964), *cited in Breckenridge*, 253 Miss. 841-42, 179 So. 2d at 783.

[52] *Breckenridge*, 253 Miss. at 839-40, 179 So.2d at 782. The defendant pointed out that the company had not qualified to do business in Mississippi since it had no offices and no address in the state, it paid no taxes, and it employed only independent news gatherers. *Id.*

The statutory basis for jurisdiction in Mississippi, the standard of "doing business," dates back as far as the 1942 Code. Rittenhouse v. Mabry, 832 F.2d 1380, 1384 (5th Cir. 1987). Soon after the passage of the 1964 amendment, the Mississippi Supreme Court adopted a tripartite standard in its formulation of the criteria for doing business. Dawkins v. White Prods. Corp., 443 F.2d 589, 591-92 (5th Cir. 1971). Borrowing from Tyee Constr. Co. v. Dulien Steel Prods., Inc., 62 Wash. 2d 106, 381 P.2d 245, 251 (1963), the Mississippi court applied three factors: (1) the purposefulness of the defendant's act, (2) its connection with the cause of action, and (3) notions of fairness and justice. Mladinich v. Kohn, 250 Miss. 138, 148, 164 So. 2d 785, 790 (1964). The *Tyee* court propounded the three factors, which bear an obvious conceptual resemblance to the constitutional standard, as a test for determining both constitutional and statutory limits of jurisdiction. *Tyee*, 381 P.2d at 251. The *Mladinich* test has persisted in Mississippi case law, however, as the judicial gauge for the "doing business" prong of the long-arm statute. Thompson v. Chrysler Motors Corp., 755 F.2d 1162, 1167 (5th Cir. 1985); *see Dawkins*, 443 F.2d at 593 (citing *Mladinich* factors); Collins v. Truck Equip. Sales, Inc., 231 So. 2d 187, 188 (Miss. 1970) (same); Hilbun v. California-Western States Life Ins. Co., 210 So. 2d 307, 310 (Miss. 1968) (same). The Mississippi court, in applying the *Mladinich* test, has relaxed the standard of purposefulness to allow jurisdiction over causes of action incident to, as well as arising from, the defendant's contacts. *See* Aycock v. Louisiana Aircraft, Inc., 617 F.2d 432, 434-35 (5th Cir. 1980) (court loosened jurisdictional requirements), *cert. denied*, 450 U.S. 917 (1981); Arrow Food Distribs., Inc. v. Love, 361 So. 2d 324, 325 (Miss. 1978) (state policy was to allow foreign corporation to sue or be sued), *cert. denied*, 439 U.S. 1073 (1979).

The amended statute allows Mississippi courts to extend their sway over defendants

Passing over this phase of the inquiry, the court held that the constitutional deficiency in the assertion of jurisdiction obviated the customary inquiry into the statutory requirements.[53] The constitutional standard of fairness set the outer limits, the court reasoned, and if these bounds were transgressed, there was no need to fall back on an analysis of the long-arm statute.[54]

In *Hertz Corp. v. Domergue*, the Mississippi court again dealt with the constraints of due process upon the operation of a state's long-arm statute.[55] The action in that case arose in Nevada, where a Mississippi resident had allegedly breached a contract for the lease of an automobile.[56] When the plaintiff brought suit in Mississippi to have the Nevada decree enforced, the Mississippi court evaluated the Mississippi defendant's contacts with Nevada under the long-arm statute of that state and in relation to the constitutional standard.[57] From its review of Nevada law, the Mississippi Supreme Court inferred that Nevada policy would favor an extension of its jurisdictional authority to the constitutional limits.[58] Proceeding to the constitutional analysis,[59] the

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in tort and contract. *See* Casano v. WDSU-TV, Inc., 313 F. Supp. 1130, 1145 (S.D. Miss. 1970) (libel), *aff'd*, 464 F.2d 3 (5th Cir. 1972); Mandel v. James Graham Brown Found., Inc., 375 So. 2d 1017, 1018-19 (Miss. 1979) (negligence); Sheridan, Inc. v. C.K. Marshall & Co., Inc., 360 So. 2d 1223, 1225 (Miss. 1978) (contract); Shackelford v. Central Bank of Mississippi, 354 So. 2d 253, 255 (Miss. 1978) (same); Miller v. Glendale Equip. & Supply, Inc., 344 So. 2d 736, 738 (Miss. 1977) (sufficiency of partially performed contract); Smith v. Temco, Inc., 252 So. 2d 212, 213-16 (Miss. 1971) (products liability).

[53] *Breckenridge*, 253 Miss. at 842-43, 179 So. 2d at 782. Courts generally resolve jurisdictional issues, theoretically at least, through a breakdown into a two-tiered analysis, ascertaining first whether the defendant's activities meet the statutory standard before proceeding to the question of constitutionality. *See* Comment, *supra* note 21, at 910 (initial inquiry begun by examination of long-arm statute); *see also* Rittenhouse v. Mabry, 832 F.2d 1380, 1383-84 (5th Cir. 1987) (due process analysis after satisfaction of statutory requirements); Thompson v. Chrysler Motors Corp., 755 F.2d 1162, 1168 (5th Cir. 1985) (necessity of due process analysis after threshold determination of statutory jurisdiction); Mississippi Interstate Express, Inc. v. Transpo, Inc., 681 F.2d 1003, 1006-07 (5th Cir. 1982) (conceding that long-arm statute was satisfied before assessing due process).

[54] *Breckenridge*, 253 Miss. at 842-43, 179 So. 2d at 783. The court found it unnecessary to reach the issue of the applicability of the statute, a question which would depend upon whether the alleged defamation occurred before the newly amended statute took effect. *Id.* at 842.

[55] 293 So. 2d 463, 464 (Miss. 1974).

[56] *Id.* at 463. Alleging that an automobile had been damaged while in the possession of the defendant, the rental company sought to recover for breach of the written contract of bailment. *Id.*

[57] *Id.* at 464.

[58] *Id.* The court cited Certain-Teed Prods. Corp. v. Second Judicial Dist. Court, 87

court determined that the lease and the use of the automobile, both undertaken in Nevada, fulfilled the requirement for minimum contacts without offending notions of fairness.[60]

The United States Supreme Court subsequently modified the minimum contacts standard by appending a foreseeability requirement in *World-Wide Volkswagen Corp. v. Woodson.*[61] The plaintiffs in *World-Wide Volkswagen* purchased an automobile from a dealer in New York before moving to Arizona.[62] While they were travelling by car through Oklahoma, there was a serious accident in which several members of the family were injured.[63] They brought a products liability action in Oklahoma against the dealer as well as against other members of the production chain: the distributor, importer, and manufacturer.[64] The dealer and distributor contested the jurisdiction of the Oklahoma court because of the localized nature of their New York business.[65] The Supreme Court held that these defendants' contacts were inadequate to meet the requisite minimum contacts standard.[66] Reiterating the position that there must be purposeful availment of the privilege of conducting activities within the state,[67] the *World-Wide Volkswagen* Court added the refinement that there must also be foreseeability of such a nature that the defendant might expect to be "haled into court"

Nev. 18, 23, 479 P.2d 781, 784 (1971), in which the Nevada court had found such traditional bases of long-arm jurisdiction as "transacting any business within the state" or "committing a tortious act within the state" to be almost infinite in their potential extent. *Hertz*, 293 So. 2d at 464 (citing *Certain-Teed Prods.*, 87 Nev. at 23, 479 P.2d at 784). Although the defendant's contacts were too slight for general jurisdiction, the court found them sufficient for specific jurisdiction. *Id.* at 466.

[59] *Hertz*, 293 So. 2d at 464. Reading *McGee* and *Hanson* together, the *Hertz* court concluded that jurisdiction would attach through a single act if three requirements were met: (1) the defendant must have purposefully availed himself of the privileges of the state; (2) the cause of action must have arisen from the consequences of his activities; and (3) the defendant himself must have had sufficient connection with the forum state. *Id.* at 464. The court ruled that the defendant's lease and use of the vehicle in Nevada were not so "single" and "isolated" a contact as to defeat specific jurisdiction. *Id.* at 466.

[60] *Hertz*, 293 So. 2d at 466. The court considered the inconvenience to the defendant, but found it not to be a dispositive factor. *Id.*

[61] 444 U.S. 286 (1980).

[62] *Id.* at 288.

[63] *Id.*

[64] *Id.*

[65] *Id.* The dealer and the distributor contested jurisdiction in a special appearance, invoking the due process clause of the fourteenth amendment. *Id.*

[66] *Id.* at 299. Since these defendants undertook no transactions within the state of Oklahoma, the Court ruled that such profits as they gleaned from the sale of automobiles capable of use in Oklahoma did not establish minimum contacts with the state. *Id.*

[67] *Id.* at 297.

in the forum state.[68]

This foreseeability component subsequently figured in the rationale of the Mississippi Supreme Court in *Administrators of the Tulane Educational Fund v. Cooley*.[69] In *Tulane*, a Mississippi plaintiff sued Tulane, a Louisiana university, seeking recovery for the wrongful death of his wife.[70] The court examined the contacts between Tulane and the state of Mississippi and found them to be adequate for the attachment of sums owed the university by debtors.[71] Tulane was not immune from such attachment, the court concluded, since the minimum contacts requirement had been fulfilled and the necessary ingredients of purposeful activity, foreseeability, and fairness were present.[72]

After being distilled and refined in earlier opinions, the Supreme Court's policy on personal jurisdiction emerged in *Burger King Corp. v. Rudzewicz*[73] as a clearly defined doctrine.[74] In *Burger King*, a Florida corporation[75] sued franchisees who were Michigan residents.[76] These defendants challenged Florida's jurisdiction.[77] The Supreme

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[68] *Id.* The Court observed that the retailer and wholesale distributor could not expect to be haled into court in Oklahoma. *Id.* at 295-96. The mobility of the product did not provide fair warning that sellers would be subject to liability in a foreign state. *Id.*

[69] 462 So. 2d 696 (Miss. 1984), *cert. denied*, 474 U.S. 820 (1985).

[70] *Id.* at 698.

[71] *Id.* The concept of minimum contacts had gained such ascendancy in constitutional law that the Supreme Court applied the standard in quasi-in-rem attachment as well as in personal jurisdiction. Shaffer v. Heitner, 433 U.S. 186, 212 (1977).

[72] *Tulane*, 462 So. 2d at 705. The court noted that Tulane had sought a continuing relationship with Mississippi and its residents through such affirmative actions as recruiting Mississippi students, offering continuing education programs to Mississippi residents, engaging in athletic contests with Mississippi universities, and treating Mississippi residents in its hospital subsidiary. *Id.* at 699-700. The court further noted that the requisite contacts must be with the forum state, not merely with a resident of the state. *Id.* at 703 (citing Iowa Elec. Light and Power Co. v. Atlas Corp., 603 F.2d 1301, 1301 n.3 (8th Cir. 1979)).

[73] 471 U.S. 462 (1985).

[74] *Note*, *supra* note 39, at 706. In its recapitulation of constitutional requirements for due process, the Court also retained the "personal availment" test of Hanson v. Denckla, 357 U.S. 235 (1958). *Burger King*, 471 U.S. at 474-76. There was to be a weighing of the interests of plaintiff, defendant, and forum in a flexible balancing test. Note, *supra* note 33, at 881. *But see* Welkowitz, *supra* note 25, at 4 (rejection of traditional balancing test implied in *Burger King* and *McGee*). Citing *Bauxites*, the Court again declared that due process restraints should protect the individual liberty interest. *Burger King*, 471 U.S. at 471-72. *See supra* note 33.

[75] *Burger King*, 471 U.S. at 466.

[76] *Id.*

[77] *Id.* at 469. Although the plaintiffs brought actions in contract and trademark infringement, the defendants challenged jurisdiction only in the contract dispute. *Id.* at 469-70 n.11. The Court noted that a single contract with a resident of the forum state

Court, in an opinion written by Justice Brennan, upheld the state's jurisdiction over the defendants[78] and reiterated the minimum contacts requirement[79] as the definitive standard.[80] For the first time the Court clearly articulated a two-part test as its standard.[81] The threshold question was the determination of the contacts with the forum state followed by the second phase of the inquiry, which was a consideration of fair play and reasonableness.[82] Declaring that the franchisees' relationship with the state satisfied this test, the *Burger King* Court subjected them to Florida's jurisdiction.[83]

Although the standard had thus become more definite, the Court evinced a new caution in applying it in *Asahi Metal Industry Co. v.*

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could not, without a more substantial link, form the basis for jurisdiction. *Id.* at 478. The ongoing nature of the contractual relationship, with its prior negotiations and subsequent consequences, however, did provide the necessary justification for the exercise of jurisdiction by the forum state. *Id.* at 479; *see* In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220, 226 (6th Cir. 1972) (requirement of contacts through single contract); Electro-Craft Corp. v. Maxwell Electronics Corp., 417 F.2d 365, 369 (8th Cir. 1969) (adequacy of contract negotiations). Courts have traditionally evinced more reluctance to allow jurisdiction over nonresident buyers than over sellers. Weintraub, *supra* note 33, at 514-15; *see* Lakeside Bridge & Steel Co. v. Mountain State Constr. Co., 597 F.2d 596, 603 (7th Cir. 1979) (jurisdiction over non-resident buyer disallowed), *cert. denied*, 445 U.S. 907 (1980). *But see* Woodfield Ford, Inc. v. Akins Ford Corp., 77 Ill. App. 3d 343, 395 N.E.2d 1131, 1137 (1979) (jurisdiction over non-resident seller refused when buyer solicited sale). In his dissent from the denial of certiorari in *Lakeside*, Justice White deplored the inconsistency in this area, voicing the fear that such confusion would inhibit commercial activity. *Lakeside*, 445 U.S. at 909-11.

[78] *Burger King*, 471 U.S. at 487.

[79] *Id.* at 474. The Court placed greater weight upon the sufficiency of contacts than on other considerations. Welkowitz, *supra* note 25, at 5.

[80] Welkowitz, *supra* note 25, at 5.

[81] Note, *supra* note 39, at 703, 706.

[82] *Burger King*, 471 U.S. at 476-78. In *International Shoe*, the two components of the inquiry had seemed to operate in tandem. Note, *supra* note 39, at 706. But in *Hanson* the Court described minimum contacts as a threshold determination. The initial step would be to evaluate the contacts as they appeared from the facts of the case. Comment, *supra* note 21, at 905 n.82. After satisfying this prerequisite, the Court would weigh such factors as fairness and reasonableness. *Id.* If the contacts should be deemed insufficient, then the Court would find jurisdiction defeated without advancing to the next stage of the inquiry. *But see* Note, *supra* note 27, at 715-16 (criticism of Missouri court for failing to consider fairness phase when minimum contacts were lacking). If the Court should proceed to the second phase, the factors put forth in *World-Wide Volkswagen* would be guidelines to determine reasonableness. Note, *supra* note 39, at 704. The factors to be considered were the defendant's interest, the forum state's interest, the plaintiff's interest, the interests of the judicial system, and the shared interest of all states. *World-Wide Volkswagen*, 444 U.S. at 292.

[83] *Burger King*, 471 U.S. at 487.

Superior Court of California.[84] *Asahi* was a "stream of commerce" case[85] in which a California resident sued a Taiwanese motorcycle manufacturer after a tire blew out, causing a serious accident.[86] The Taiwanese defendant sought indemnification from the Japanese manufacturer of the tire's valve assembly, Asahi Metal Industry Co.[87] After the original action was settled and dismissed, only the third-party action of one foreign party against another remained to be tried in the California court.[88] Reversing the ruling of the California Supreme Court, the Supreme Court denied jurisdiction.[89] In *Asahi*, Justice O'Connor concluded that the third party defendant's contacts with California were not sufficient.[90] Reviewing the relevant principles in prior cases,[91] Justice O'Connor addressed the matter of "purposeful availment."[92] In her interpretation of this requirement, Justice O'Connor found it insufficient that a defendant might be aware that his product would enter the stream of commerce.[93] Additional conduct would be necessary for jurisdiction.[94] Four Justices disagreed with this part of the plurality's requirement of additional conduct.[95] However, the Court unanimously agreed that the assertion of jurisdiction over the foreign defendant must fail because of the requirement of fairness.[96]

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[84] 107 S. Ct. 1026 (1987).

[85] *Asahi*, 107 S. Ct. at 1029. Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961), was the seminal "stream of commerce" case. Comment, *Asahi Metal Industry*, *supra* note 39, at 208. In that decision the Illinois court held nonresident producers of defective components liable in products liability on the theory that a substantial flow of the products into the forum state should have been predictable. *Id.* at 208-09. In *World-Wide Volkswagen*, the Supreme Court endorsed this theory and applied it to suppliers at the upper end of the distribution chain. *Id.* at 209. The purposeful availment requirement of *Hanson*, however, limited the potential for liability by the imposition of a requirement of purposeful conduct by the defendant. *See Hanson*, 357 U.S. at 253.

[86] *Asahi*, 107 S. Ct. at 1029.

[87] *Id.*

[88] *Id.* at 1029-30. The *Asahi* court gave little attention to the burden of the cross claimant in its analysis of the fairness component. *See* Note, *The Supreme Court — Leading Cases: Federal Jurisdiction and Procedure*, 101 HARV. L. REV. 250, 268-70.

[89] *Asahi*, 107 S.Ct. at 1035.

[90] *Id.* The Court noted that Asahi had no office, agents, or property in California. *Id.* It also had no control over the system which distributed its products in America. *Id.* at 1033.

[91] *Id.* at 1031-34. The Court cited *Burger King* and *International Shoe* on minimum contacts, *Hanson* and *Burger King* on purposeful availment, *McGee* on actions by the defendant, *World-Wide Volkswagen* on the requirement of a more direct link than that caused by a unilateral act by a consumer, and *World-Wide Volkswagen* on foreseeability of liability. *Id.*

[92] *Asahi*, 107 S. Ct. at 1033.

[93] *Id.* at 1032-33.

[94] *Id.*

In the instant case the Mississippi Supreme Court reasoned that because the defendant had chosen to have a document notarized in Mississippi,[97] she had "purposefully availed"[98] herself of the privileges of the state to the extent necessary for establishing the minimum contacts required by the Constitution.[99] Recasting the proposition in terms of Mississippi case law,[100] the court held that since Mississippi law implicitly extends the reach of personal jurisdiction to a defendant who operates a vehicle or executes a lease within the state,[101] then this principle justified the exercise of jurisdiction over a defendant who executes an instrument which purportes to convey property.[102] Analyzing the issue further in the light of the constitutional standard, the court declared that anyone who executes a document within Mississippi should reasonably expect to be subject to litigation here,[103] and that such action satisfies the foreseeability component of the constitutional test.[104] The court concluded that the level of the defendant's activities thus met the constitutional standard, because due process had been observed in the assertion of personal jurisdiction over the defendant.[105]

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[95] *Id.* at 1035-38 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and in the judgment). Justices Brennan, White, Marshall, and Blackmun disagreed with the Court's analysis of the stream of commerce theory and with the conclusion that awareness of the destination of the products causing the harm did not amount to purposeful availment. *Id.* Justices Stevens, White, and Blackmun found the minimum contacts inquiry unnecessary because of the fairness factor, and they disagreed with that part of the opinion which found that the defendant's participation in the events which led to the injury stopped at the level of awareness. *Id.* at 1038 (Stevens, White, and Blackmun, JJ ., concurring in part and concurring in the judgment). The division in the court over the application of the minimum contacts doctrine may presage an eventual gravitation toward the reasonableness standard, with less emphasis on minimum contacts. Note, *supra* note 88, at 270.

[96] *Asahi,* 107 S. Ct. at 1035. Factors noted in the opinion included concern over international ramifications, the burden on the defendant, and the interests of the state. *Id.* In commenting on the burden on the Japanese defendant, Justice O'Connor observed that the defendant corporation would have to travel to California and deal with the laws of a foreign judicial system, if subjected to California's jurisdiction. *Id.* at 1034.

[97] *Anderson,* 523 So. 2d at 1026.

[98] *Id.* The court applied this refinement on the constitutional test for personal jurisdiction as developed by the United States Supreme Court in *Hanson v. Denckla,* 357 U.S. at 253. The Mississippi court also cited *Burger King,* 471 U.S. at 473-74: "[W]here individuals purposefully derive benefit from their interstate activities . . . it may well be unfair to allow them to escape having to account in other states for consequences that arise proximately from such activities . . . ." *Anderson,* 523 So. 2d at 1026 (quoting *Burger King,* 471 U.S. at 473-74).

[99] *Anderson,* 523 So. 2d at 1026. Although the Mississippi court found the Louisiana defendant to be within the grasp of the state's long-arm statute, the court acknowledged that there must be compliance with due process requirements of the Constitution as well, according to the "minimum contacts" standard established by the United States Supreme Court in *International Shoe. Id.* at 1027. The court made a fleeting reference to *Shaffer v. Heitner* for its extension of the minimum contacts requirement to attachment proceedings. *Anderson,* 523 So. 2d at 1026. Although the *Anderson* case involved an attachment in chancery, the constitutional issue did not arise, since the attachment failed to meet statutory requirements. *Id.* at 1026.

[100] *Anderson,* 523 So. 2d at 1027. Acknowledging the lack of specific authority for predicating jurisdiction on the notarization of a document within the state, the court turned to Hertz Corp. v. Domergue, 293 So. 2d 463 (Miss. 1979), and drew its precedent

With the decision in *Anderson v. Sonat Exploration Co.*, the Mississippi Supreme Court has reduced minimum contacts to a new minimum. The sweeping provision which extends liability to any out-of-state resident whose sole contact with the state consists of the official execution of a document through the services of a notary[106] will no doubt have far-reaching consequences. Decidedly negative consequences will ensue if the effect is to warn off non-residents so that they become wary of entering into minor transactions in Mississippi.[107] The *Anderson* case differs from many other single-contact cases, in that the execution of the document was an isolated act and not one leading to a

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by analogy from that case. *Anderson*, 523 So. 2d at 1026. In *Hertz*, the Mississippi court had recognized Nevada's jurisdiction over a defendant whose contacts with that state consisted of executing a lease for an automobile and driving the vehicle within the state. *Anderson*, 523 So. 2d at 1026; *see supra* notes 55, 56 and accompanying text.

[101] *Anderson*, 523 So. 2d at 1026. The court noted that the *Hertz* case involved both the lease and the use of the vehicle. *Id.* The court stated, however, that the language of the opinion implicitly recognized either activity as an independent ground for jurisdiction. *Id.* Although the *Hertz* court may have intended to support jurisdiction on this alternative basis, the language of the opinion fails to convey such an intent, for it clearly treats the lease and use of the vehicle as a single act. *See Hertz*, 203 So. 2d at 466; *see also supra* note 59 and accompanying text.

[102] *Id.* at 1027. The court extended this basis for jurisdiction and applied it in the instant case. *Id.*

[103] *Id.*

[104] *Id.* The court noted that the United States Supreme Court had developed this second refinement on the minimum contacts standard, that of foreseeability, in *World-Wide Volkswagen*, 444 U.S. at 286: "The foreseeability that is relevant to due process analysis . . . is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there." *Id.* at 297.

[105] *Anderson*, 523 So. 2d at 1027-28.

[106] *See supra* note 7 and accompanying text. The court had earlier stressed that the defendant must have sufficient contacts with the state, not merely with a resident of the state. *See supra* note 72 and accompanying text.

[107] *See supra* note 77.

continuing relationship, as would be the case with a contract.[108] Although the defendant's contact with the state did contribute to the consummation of the offending transaction, thereby providing the causal nexus necessary for specific jurisdiction,[109] the sufficiency of such a limited contact seems questionable, even when viewed in the light of *Hertz*, the opinion on which the court relied for its ruling in the *Anderson* case.[110] In any event, the law in Mississippi continues to be what the Mississippi Supreme Court declares it to be, unless it runs afoul of the Constitution. If the new precedent in Mississippi law is to endure, however, it may have to pass constitutional muster in the conservative climate generated by the current United States Supreme Court.[111] As the *Anderson* court noted, the initial hurdle of the sufficiency of minimum contacts contains the concomitant requirements of purposeful availment and foreseeability.[112] The defendant in the case deliberately availed herself of the services of the state, thus fulfilling the requirement of purposeful availment.[113] It is less likely, however, that the defendant could have foreseen litigation, especially since there appears to be a dearth of cases precisely on point, and such precedent as there is seems to derive from a strained analogy with *Hertz*.[114] It remains to be seen whether the Mississippi Supreme Court's estimation of foreseeability comports with that of the United States Supreme Court. It is possible that the consideration of fairness may ultimately subsume the requirement of minimum contacts and determine the fate of the new rule.[115] What the *Anderson* decision portends for litigants and for Mississippi law remains unclear, but it will have the immediate effect of extending the reach of Mississippi's jurisdiction.

Betty Whittington Maynard

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[108] *See supra* notes 39, 77 and accompanying text.

[109] *See supra* notes 39, 58 and 59.

[110] *See supra* note 101.

[111] *See supra* text accompanying notes 84, 93 and 94.

[112] *See supra* notes 98, 103 and accompanying text.

[113] *See supra* notes 7, 98 and accompanying text.

[114] *See supra* notes 100-02 and accompanying text.

[115] *See supra* note 82 and accompanying text. If in the future the varying viewpoints expressed in the *Asahi* opinions should coalesce into a single policy, the reasonableness standard may emerge as the primary basis for jurisdiction, thus relegating the minimum contacts doctrine to a lesser status. Cases like *Anderson* could then be more easily resolved, despite the scantness of the defendant's contacts, by focusing on other factors, such as the relative lack of inconvenience to the plaintiff. Thus, even if the justification for jurisdiction should falter under the minimum contacts doctrine, it might be salvageable if reasonableness were the overriding consideration. *See* Note, *supra* notes 88 and 95.

CONSTITUTIONAL LAW — DUE PROCESS — WHEN EXECUTOR EITHER KNOWS OR MAY REASONABLY ASCERTAIN THE IDENTITY OF AN ESTATE'S CREDITOR HE MUST PROVIDE ACTUAL NOTICE THAT CREDITOR'S CLAIM WILL TERMINATE

Plaintiff[1] appealed from a decision of the Oklahoma Supreme Court upholding the validity of a probate non-claim statute[2] which barred the plaintiff's claim against the decedent's estate.[3] The District

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[1] Plaintiff, Tulsa Professional Collection Services, Inc., was a subsidiary of the St. John Medical Center in Tulsa, Oklahoma, in which the decedent, H. Everett Pope, Jr., was a patient. Tulsa Professional Collection Servs., Inc. v. Pope, 108 S. Ct. 1340, 1343 (1988).

[2] *Id.* at 1344. The statute which the Oklahoma Supreme Court held constitutional was a non-claim statute relating to the claims of creditors of an estate and which provided in pertinent part that, "[i]f a claim arising upon a contract heretofore made, be not presented within the time limited in the notice, it is barred forever." OKLA. STAT. tit. 58, § 333 (1981).

[3] *Pope*, 108 S. Ct. at 1343-44. The statutory scheme within which the non-claim statute acted to bar creditor's claims began with the appointment of an executor or executrix by the probate court. OKLA. STAT. tit. 58, §§ 30, 333 (1981). Another primary element of the statutory scheme was the notice provision which stated in pertinent part:

> *Every executor or administrator must, immediately after his appointment, give notice to the creditors of the deceased*, requiring all persons having claims against said deceased to present the same, with necessary vouchers, to such executor or administrator, at the place of his residence or business, to be specified in the notice, *within four (4) months from the date of the first publication of said notice*; such notice must be published in some newspaper printed in said county once a week for two (2) consecutive weeks . . . .

Id. § 331 (emphasis added). The final element of the statutory scheme was the non-claim statute itself which acted to bar claims not filed within the designated time period. *Id.* § 333. The decedent, H. Everett Pope, Jr., who died at St. John Medical Center ("the hospital") on April 2, 1979, incurred expenses in excess of $142,000 during his five-month hospital stay. *In re* Estate of Pope, 733 P.2d 396, 397 (Okla. 1986), *rev'd sub nom.* Tulsa Professional Collection Servs., Inc. v. Pope, 108 S. Ct. 1340 (1988). The decedent's insurer did not pay all of the expenses incurred during the decedent's hospital stay, leaving a balance due of $14,657.55. *In re Estate of Pope*, 733 P.2d at 397. The hospital assigned its claim for the balance due from decedent's estate to the plaintiff, Tulsa Professional Collection Services, Inc., the hospital's subsidiary for collections. *Pope*, 108 S. Ct. at 1343. A dispute arose between the plaintiff and Joanne Pope, the wife of the decedent, concerning what portion of the unpaid balance of the decedent's hospital bill was attributable to the decedent's last illness. *In re Estate of Pope*, 733 P.2d at 397. The classification of the decedent's expenses as attributable to his last illness was significant because § 594 of the Oklahoma Probate Code provided that "[an estate] must pay the funeral expenses and the expenses of the [decedent's] last illness." OKLA. STAT. tit. 58, § 594 (1981).

Court of Tulsa County, Oklahoma held for the defendants.[4] The Oklahoma Court of Appeals, District IV, affirmed.[5] Upon rehearing, the plaintiff challenged the constitutionality of the non-claim statute for the first time.[6] The plaintiff argued that due process required an estate to provide actual notice of pending probate proceedings to its creditors.[7] The defendant contended that the probate non-claim statute was a self-executing statute of limitations[8] and, therefore, need only require constructive notice of probate proceedings.[9] The court of appeals rejected the plaintiff's constitutional objection to the validity of the non-claim statute.[10] The Oklahoma Supreme Court affirmed.[11] On writ of certiorari, the United States Supreme Court, *held*, reversed and remanded. When an executor either knows or may reasonably ascertain the identity of an estate's creditor, he must provide such creditor with actual notice that its claim will terminate. *Tulsa Professional Collection Servs., Inc. v. Pope*, 108 S. Ct. 1340 (1988).

Historically, the due process clause of the fourteenth amendment[12]

The probate court admitted the decedent's will to probate on July 16, 1979. *In re Estate of Pope*, 733 P.2d at 397. The probate court appointed Joanne Pope as executrix of her husband's estate, and she published notice as required by statute on July 17, 1979 and July 24, 1979. *Id.* The plaintiff, who received no actual notice of the pending probate proceedings, failed to file its claim with the executrix of the decedent's estate within the time period prescribed by statute. *Id.* Section 333 of the Oklahoma Probate Code, therefore, barred the plaintiff's claim against the decedent's estate. OKLA. STAT. tit. 58, § 333 (1981).

[4] *Pope*, 108 S. Ct. at 1343. Plaintiff initially contended that § 594 of the Probate Code which required an estate to pay the expenses of the decedent's last illness rendered the probate non-claim statute inapplicable. *Id.* The District Court of Tulsa County rejected the plaintiff's statutory interpretation because it found such an interpretation to be contrary to the legislative intent. *In re Estate of Pope*, 733 P.2d at 398.

[5] *Pope*, 108 S. Ct. at 1343.

[6] *Id.* The plaintiff initially argued that the non-claim statute did not apply to claims which arose from the decedent's last illness. *In re Estate of Pope*, 733 P.2d at 398.

[7] *Pope*, 108 S. Ct. at 1343. The plaintiff, in its argument, stressed that the defendant knew of its claim against the decedent's estate. *In re Estate of Pope*, 733 P.2d at 399.

[8] *In re Estate of Pope*, 733 P.2d at 401. The defendant argued that because the passage of time triggered the statutory bar to creditor's claims against an estate, the non-claim statute was merely a statute of limitations. *Id.*

[9] *Id.* The defendant contended that the plaintiff's own inaction terminated its claim. *Id.* at 400.

[10] *Pope*, 108 S. Ct. at 1343. The court of appeals, in a supplemental opinion, rejected on the merits the plaintiff's contention that the notice provisions of the state's non-claim statute violated due process. *Id.*

[11] *In re Estate of Pope*, 733 P.2d at 401.

[12] U.S. CONST. amend. XIV, § 1. The due process clause states that "[n]o State shall . . . deprive any person of life, liberty, or property without due process of law." *Id.*

defined constitutional limits within which states could enforce their legislative enactments.[13] The United States Supreme Court recognized that one of the essential elements of due process was sufficient notice.[14] Scholars have suggested that due process embodied by "notice and an opportunity to be heard" constitutes the foundation of justice.[15] Unsuccessfully challenged on various occasions,[16] the notice provisions of probate non-claim statutes[17] enjoyed virtually unquestioned validity in

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[13] L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 10-7 (1978).

[14] Milliken v. Meyer, 311 U.S. 457, 463 (1940) (personal service of process in another state satisfied notice requirement of due process); Grannis v. Ordean, 234 U.S. 385, 395 (1914) (misspelled name on mailed notice satisfied notice requirement); Priest v. Trustees of the Town of Las Vegas, 232 U.S. 604, 613 (1914) (held judgment in action to quiet title void because known parties received no actual notice); Roller v. Holly, 176 U.S. 398, 413 (1900) (held service of process to defendant in Virginia five days prior to trial in Texas to be unreasonable).

[15] L. TRIBE, *supra* note 13, § 10-7, at 503. Justice Frankfurter, in his concurring opinion in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 171-72 (1951), stated that, "[n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."

[16] Christianson v. King County, 239 U.S. 356, 358-59 (1915) (held publication notice to heirs of intestate sufficient to comply with due process); Goodrich v. Ferris, 214 U.S. 71, 80-81 (1909) (upheld validity of posted notice to heirs); Farrell v. O'Brien, 199 U.S. 89, 118 (1905) (upheld no notice in ex parte probate proceeding with one year within which to file claims); Bent v. Thompson, 138 U.S. 114, 124 (1891) (same); Case of Broderick's Will, 88 U.S. (21 Wall.) 503, 516-17 (1874) (upheld publication and posted notice of probate proceedings).

[17] *See, e.g.*, UNIF. PROB. CODE §§ 3-801, 803, 8 U.L.A. 351, 354 - 60 (1983) (substantially adopted by various states including Alaska, Arizona, Colorado, and Hawaii, uniform code allowed four month period following first publication notice and three year period following decedent's death for creditors to file claims); ARK. STAT. ANN. § 28-50-101 (1987) (three month period following publication notice and five year period following decedent's death); GA. CODE ANN. § 53-7-02 (1981) (creditor's claim not barred but dropped in priority if not filed within three month period following publication notice); MISS. CODE ANN. §§ 91-7-147, -151 (Supp. 1988) (90 day period following publication or posted notice if estate valued at less than $500).

American probate proceedings evolved from those employed by English ecclesiastical courts in the seventeenth century. Comment, *Probate Proceedings — Administration of Decedents' Estates — The Mullane Case and Due Process of Law*, 50 MICH. L. REV. 124, 129 (1951). The English procedures adopted by various states called for probate in common as well as solemn form. *Id.* at 130. An ex parte proceeding, common form probate consisted of an essentially administrative procedure in which the court provided no notice to interested parties. *Id.* If a party raised an objection, the proceeding held was in solemn form, a formal procedure requiring notice to heirs, legatees, and devisees. *Id.* The probate procedures brought from England evolved until constructive notice became generally accepted. *Id.* at 131. States adopted some type of probate non-claim statute which acted to bar the claims of creditors upon the passage of time, tied to either the dececourts prior to 1950.[18]

In 1950, the United States Supreme Court, in *Mullane v. Central Hanover Bank and Trust Co.*,[19] struck down the notice provisions of a New York statute which terminated the rights of beneficiaries of a common trust fund to proceed against the trustee for improper management.[20] The New York Banking Law provided for a judicial settlement of accounts every three years.[21] The notice provisions required the trustee to give beneficiaries notice by publication.[22] The Court, in *Mullane*, stated that "[a]n elementary and fundamental requirement in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[23] The Court did not, however, set forth a formula for determination of when a statute violated due process.[24] The Court rejected the efficacy of historically valid constructive notice, stating that in this case, publication had little or no chance of actually notifying interested parties.[25] The Court, in *Mullane*, held that due process required effective notice based upon practicality and reasonableness.[26]

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dent's death or the publication of notice. Falender, *Notice to Creditors in Estate Proceedings: What Process is Due?*, 63 N.C.L. REV. 659, 667 (1985).

[18] Comment, *supra* note 17, at 137-38.

[19] 339 U.S. 306 (1950).

[20] *Id.* at 319-20. The New York Banking Law provided for judicial settlement of accounts whereby all potential claims for mismanagement of the trust fund terminated upon decree of the court. *Id.* at 311.

[21] *Id.* at 309. The statute required the initial accounting to occur approximately one year after the establishment of a fund. *Id.*

[22] *Id.* at 309-10. The New York Banking Law only required notice by publication in a newspaper for four successive weeks. *Id.* The defendant trust company provided notice in compliance with minimum statutory requirements. *Id.* No one appeared at the judicial settlement proceedings on behalf of any income or principal beneficiaries of the trust. *Id.*

[23] *Id.* at 314. The Court distinguished publication notice, in this context, with posted notice on real property of which the owner was in possession. *Id.* at 316.

[24] *Id.* at 314. The Court suggested that it must balance the interest of the state in promoting a settlement of claims against fiduciaries with the individual rights of the beneficiaries. *Id.* at 313-14.

[25] *Id.* at 315. The Court stated in pertinent part:

> Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed . . . . In weighing its sufficiency on the basis of equivalence with actual notice we are unable to regard this as more than a feint.

Id.

[26] *Id.* at 317. The Court did not require extensive, costly searches to determine the

Uncertain about the classification of this cause of action as in rem or in personam, the Court dismissed such distinctions as ancient classifications with no bearing on due process requirements.[27] The Court noted the inconsistency of such classifications and, therefore, believed that a rule based upon such classifications would be inherently unworkable.[28] The Court, however, expressly refused to overrule all precedent in this area.[29] Although scholars at the time suggested that *Mullane* cast serious doubt on the validity of probate non-claim statutes,[30] most state courts continued to uphold such statutes on grounds which gradually eroded in the ensuing line of cases.[31] The next case which further undermined the validity of constructive notice was *City of New York v. New York, N. H. & H. R. R. Co.*[32]

The United States Supreme Court in *New York, N. H. & H. R. R.* struck down a bankruptcy statute which barred potential claims of creditors not filed within a prescribed period of time following publication notice.[33] Although aware of the reorganization proceedings, the

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interests of all potential beneficiaries. *Id.*

[27] *Id.* at 312. The Court stated that "the requirements of the Fourteenth Amendment to the Federal Constitution do not depend on a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state." *Id.*

[28] *Id.* at 313. The Court suggested that the variability of the classifications of actions in different states rendered a rule based on such classifications unworkable as a constitutional principle. *Id.* Such a rule failed to address the central issue in a due process question, the balance between the competing interests of the state and the individual. *Id.*

[29] *Id.* at 314. The Court stated that constructive notice provided sufficient notice in some circumstances. *Id.* The "practicalities and peculiarities" of each case affected the validity of the method of notice chosen. *Id.* at 314-15.

[30] Note, *Requirements of Notice in Rem Proceedings*, 70 Harv. L. Rev. 1257, 1270 (1957) (suggested in light of *Mullane*, notice by mail was necessary in probate proceedings); *see* Note, *The Effect of* Mullane v. Central Hanover Bank and Trust Company *Upon Publication Notice in Iowa*, 36 Iowa L. Rev. 47, 60 (1950) (suggested publication notice provisions of Iowa laws lacked constitutional validity in light of *Mullane*); Note, *Validity of Probate Notice Statutes in Ohio*, 27 U. Cinn. L. Rev. 76, 87 (1958) (suggested Ohio abandon publication notice in probate proceedings except for unascertainable parties). *But see* Comment *supra* note 17, at 138-39 (suggested in rem nature of ex parte probate proceedings permitted continued use of publication notice).

[31] *In re* Cluck's Estate, 168 Neb. 13, 95 N.W.2d 161, 165-66 (1959) (distinguished *Mullane* on acceptance of well-known custom and in rem/in personam classification grounds); *In re* Estate of Shew, 48 Wash. 2d 732, 296 P.2d 667, 669 (1956) (distinguished *Mullane* on in rem/in personam classification grounds); New York Merchandise Co. v. Stout, 43 Wash. 2d 825, 264 P.2d 863, 864 (1953) (distinguished *Mullane* on non-adjudicatory nature of proceedings).

[32] 344 U.S. 293, 296 (1953).

[33] *Id.* at 297. The United States District Court, District of Connecticut, required the debtor to provide actual notice only to the creditors already in court. *Id.* at 294. Other

creditor did not know that its lien against railroad property was in jeopardy.[34] The finality of the disposition of the creditor's claim led the Court to require actual notice to known creditors in a bankruptcy proceeding.[35] The Court noted that "publication is a poor and sometimes hopeless substitute for actual service of process."[36] Significant similarity existed between the bankruptcy proceeding in *New York, N. H. & H. R. R. R.* and probate proceedings then in use.[37]

In *Walker v. City of Hutchinson*,[38] a case decided only three years after *New York, N. H. & H. R. R R.*, the United States Supreme Court continued its rejection of constructive notice in proceedings involving property interests protected by the fourteenth amendment.[39] The Court overturned a Kansas condemnation proceeding[40] because the publication notice given to the landowner failed to satisfy due process.[41] The Court, in *Walker*, held that when state proceedings "di-

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creditors received notice by publication. *Id.* Except for a demonstration of sufficient cause, the passage of the date set by the court barred all unfiled claims. *Id.*

[34] *Id.* at 294. The railroad which had knowledge of the city's lien published notice in five newspapers of the need to file claims with the bankruptcy court. *Id.* New York, which received no actual notice of the impending deadline, failed to file its lien. *Id.* When New York failed to file, the court transferred the old railroad property to the newly reorganized company free of New York's liens. *Id.*

[35] *Id.* at 297. The Court stated that "notice embodies a basic principle of justice — that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights." *Id.* New York received no such notice prior to the termination of its claim. *Id.*

[36] *Id.* at 296. Publication notice did not constitute "reasonable notice" under the circumstances. *Id.*

[37] Falender, *supra* note 17, at 684. Both proceedings would have begun with a petition filed with the court. *Id.* In the case of probate proceedings, either petition would have resulted in an adjudication of bankruptcy or death. *Id.* Only those claims filed on a timely basis would have received consideration for payment in either a bankruptcy proceeding or one in probate. *Id.* In addition, creditors would have received payment from an estate, a bankruptcy estate or an estate of the decedent. *Id.*

[38] 352 U.S. 112 (1956).

[39] *Id.* at 117. The Court considered the publication notice to constitute "no notice." *Id.*

[40] *Id.* at 118. The Kansas procedure required the three commissioners appointed by a state district court to provide landowners with ten days' notice of a proceeding to determine the compensation for land taken. *Id.* at 113. The procedure required notice either "in writing" or by publication. *Id.* at 114. After a 30 day period following the commissioners' determination of compensation, a landowner could not appeal. *Id.*

[41] *Id.* at 116. The City of Hutchinson provided notice to the plaintiff, Walker, by publication in Hutchinson's official city newspaper. *Id.* at 114. The plaintiff alleged that he knew nothing of the proceeding until after the appeal period had lapsed. *Id.* The plaintiff, therefore, took no action within the prescribed 30 day period. *Id.*

In a case involving a New York City condemnation proceeding, the United States rectly and adversely affect" a protected property interest, due process required actual notice.[42] The *Walker* decision, which failed to mention the in rem nature of condemnation proceedings as a factor in the determination of sufficient notice, further eroded the validity of such classifications as a ground for distinguishing *Mullane* from cases which involved probate proceedings.[43] The Court, however, did not hold constructive notice invalid in all contexts.[44] In *Texaco, Inc. v. Short*,[45] the United States Supreme Court clarified its position on when lack of actual notice was proper.[46] In *Texaco*, the Court upheld an Indiana statute of limitations which caused abandoned mineral interests to lapse

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Supreme Court held posted and published notice insufficient to satisfy due process. Schroeder v. City of New York, 371 U.S. 208, 211 (1962). The condemnation procedure barred all claims which resulted from the city's acquisition of property upon the passage of three years. *Id.* at 210. The Court interpreted *Mullane* and *Walker* to require actual notice to "known or very easily ascertainable" parties with protected property interests affected by condemnation proceedings. *Id.* at 213. *See* Note, *The Constitutionality of No-Notice Provisions of the Uniform Probate Code*, 60 MINN. L. REV. 317, 340 (1976) (recommended adoption of Uniform Probate Code with changes to provide for actual notice in light of *Mullane*); Note, *Due Process — The Requirement of Notice in Probate Proceedings*, 40 MO. L. REV. 552, 562-63 (1975) (recommended adoption of remedial measures to amend probate statutes in light of *Schroeder*).

Professor Fink proposed the adoption of an ante-mortem probate proceeding as a partial alternative to the probate proceedings then in use. H. Fink, *Ante-Mortem Probate Revisited: Can an Idea Have Life After Death?*, 37 OHIO ST. L.J. 264, 283 (1976). The proposed procedure would have separated the determination of a will's validity from the settlement of accounts such that upon the decedent's death, the executor could have concentrated upon the payment of debts and distribution of assets. *Id.* at 283-84.

[42] *Walker*, 352 U.S. at 115; *see* Memphis Light, Gas and Water Div. v. Craft, 436 U.S. 1, 9 (1978) (termination of utility service without hearing concerning disputed bill adversely affected state created interest in protection of consumers).

[43] Note, *Notice Requirements in California Probate Proceedings*, 66 CAL. L. REV. 1111, 1118 (1978). *Walker* left little doubt that the classification of a cause of action did not affect due process requirements. *Id. But see* Brunnell Leasing Corp. v. Wilkins, 11 Ariz. App. 165, 462 P.2d 858, 860 (1969) (explicitly distinguished *Mullane* on grounds of in rem/in personam classification); Gano Farms, Inc. v. Estate of Kleweno, 2 Kan. App. 506, 582 P.2d 742, 744 (1978) (considered non-claim statutes to be statutes of limitation to which *Mullane* did not apply); Haas v. Haas, 504 S.W.2d 44, 47 (Mo. 1973) (same distinction applied to probate non-claim statute); Baker Nat'l Bank v. Henderson, 151 Mont. 526, 445 P.2d 574, 576 (distinguished *Mullane* on grounds of well-settled custom), *appeal dismissed*, 393 U.S. 530 (1969).

[44] *Walker*, 352 U.S. at 116. The Court stated that in a case involving "missing or unknown" parties, publication would suffice. *Id.*

[45] 454 U.S. 516 (1982).

[46] *Id.* at 536. The Court, in *Texaco*, stated that, "[t]he Due Process Clause does not require a defendant to notify a potential plaintiff that a statute of limitations is about to run, although it certainly would preclude him from obtaining a declaratory judgment that his adversary's claim is barred without giving notice of that proceeding." *Id.*

after a period of years.[47] The Court held that since the inaction of the mineral interest owner was not "state action" which cut off an owner's interest, the Indiana statute was a self-executing statute of limitations which did not fall within the purview of *Mullane*.[48] The *Texaco* decision, however, clouded the issue of whether the *Mullane* analysis applied to probate proceedings.[49]

In *Mennonite Board of Missions v. Adams*,[50] the United States Supreme Court applied *Mullane* to the notice requirements of a tax sale, a nonadjudicatory procedure.[51] Although the tax sale did not immediately extinguish the plaintiff's claim, it diminished the value of a protected property interest and thereby invoked due process.[52] The Court held that publication notice to mortgagees pursuant to a tax sale was unreasonable when an "inexpensive and efficient mechanism such as mail service is available."[53] The Court, in *Mennonite*, held that the publication notice provisions of the Indiana tax sale procedure violated due process.[54] The *Mennonite* decision, which struck down a nonadjudicatory procedure, cast serious doubt on one of the primary grounds for distinguishing probate proceedings from *Mullane*.[55]

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[47] *Id.* at 539-40. The Dormant Mineral Act provided that if the owner of a severed mineral interest did not use such interest for 20 years, the interest lapsed and reverted to the surface owner if the mineral owner failed to file a statement of claim. *Id.* at 518. The statute did not require the surface owner to provide the mineral owner with notice of the impending lapse. *Id.* at 520.

[48] *Id.* at 536; *see* Standard Oil Co. v. New Jersey, 341 U.S. 428, 434 (upheld validity of escheat procedure which terminated owner's interest upon passage of 14 years).

[49] G. Smith, *Estate of John Jones: Due Process to Whom?*, 30 RES GESTAE 544, 548 (1987). The author viewed *Texaco* as a departure from the *Mullane* line of cases which held publication notice insufficient to satisfy due process. *Id.* The article did not consider the unconstitutionality of Indiana's probate statute a "foregone conclusion" specifically in light of *Texaco*. *Id. But see* Note, *Decedents' Estates*, 35 S. C. L. REV. 127, 131-32 (1983) (distinguished non-claim statutes from statute of limitations).

[50] 462 U.S. 791 (1983).

[51] *Mennonite*, 462 U.S. at 800.

[52] *Id.* at 798. The Mennonite Board of Missions, the plaintiff, had a lien on property it sold to Alfred Moore in order to secure his debt of $14,000. *Id.* at 793. Elkhart County, Indiana, began proceedings to sell Moore's property for nonpayment of taxes. *Id.* at 794. The tax sale procedure provided for actual notice by certified mail to the owner's last known address and publication notice to all other parties, such as the plaintiff, the mortgagee. *Id.* at 793. The county complied with the notice requirements, and the plaintiff received no actual notice either from the county or from Moore. *Id.* at 794. The sale proceeded, and the plaintiff who continued to receive payments from Moore did not learn of the sale until the statutory redemption period had lapsed. *Id.* Pursuant to Indiana law, a mortgage holder with priority loses such priority to the purchaser in a tax sale. *Id.* at 798. The Court noted that this loss of priority represented sufficient adverse effect to invoke due process. *Id.* In addition, the expiration of the redemption period terminated the plaintiff's interest. *Id.*

[53] *Id.* at 799. (quoting Greene v. Lindsey, 456 U.S. 444, 455 (1982)). The United States Supreme Court held posted notice invalid in a forcible entry and detainer action. *Greene*, 456 U.S. at 455-56. The Court, in *Greene*, rejected the customary nature of posting eviction notices as a ground for distinguishing *Mullane*. *Id.* at 454. The Court found

Shortly after *Mennonite*, the United States Supreme Court vacated the decision of the Nevada Supreme Court in *Continental Insurance Co. v. Moseley*[56] and remanded the case for reconsideration in light of *Mennonite*.[57] In *Moseley*, the Nevada Supreme Court, in a significant departure from most state courts, applied the *Mullane* balancing approach to a probate non-claim statute.[58] The Nevada court initially held constructive notice valid because, in the court's opinion, publication constituted a method "sufficiently calculated to provide actual notice. . . ."[59] Upon remand,[60] however, the Nevada Supreme Court became the first to strike down constructive notice provisions of

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that posted notice violated due process. *Id.*

The United States Supreme Court held even mailed notice pursuant to a tax sale insufficient, because the recipient, an incompetent, had no guardian. Covey v. Town of Somers, 351 U.S. 141, 146-47 (1956). The Court held that the inability of the recipient of notice to comprehend its meaning was apparent to town officials, and that the notice given was insufficient to constitute due process. *Id.*

[54] *Mennonite*, 462 U.S. at 800.

[55] Kuether, *Is Kansas Probate Non-Claim Statute Unconstitutional?*, 54 J. KAN. B.A. 115, 132-33 (1985). Professor Kuether stated that because most non-claim statutes began running after the filing of a petition with the probate court, a court could find a state action to exist. *Id.* Professor Kuether suggested that practitioners utilize mailed notice to prevent litigation regarding the validity of the Kansas procedure. *Id. But see* Coley v. Estate of Odom, 500 So. 2d 188, 190 (Fla. 1986) (distinguished *Mullane* and *Mennonite* from probate proceedings on adjudicatory versus nonadjudicatory grounds); Gibbs v. Estate of Dolan, 146 Ill. App. 3d 203, 496 N.E.2d 1126, 1130 (1986) (same); Cool v. Reed, 717 S.W.2d 518, 520 (Mo. 1986) (same); Estate of Busch v. Ferrell-Duncan Clinic, Inc., 700 S.W.2d 86, 89 (Mo. 1985) (same); *Nonclaim Statute Upheld — No Notice to Creditors*, 15 ESTATE PLANNING 62, 62-63 (1988) (noted state courts distinguished *Mullane* and *Mennonite* from probate proceedings on adjudicatory versus nonadjudicatory grounds).

[56] 463 U.S. 1202 (1983).

[57] *Moseley*, 463 U.S. at 1202. In *Moseley*, the plaintiff, Continental Insurance Company, challenged the validity of Nevada's non-claim statute on due process grounds. *Moseley*, 98 Nev. 476, 653 P.2d 158, 160 (1982), *vacated and remanded*, 463 U.S. 1202 (1983). The Nevada probate non-claim statute barred all claims not filed within 60 days of publication notice. *Id.* at 160.

[58] Falender, *supra* note 17, at 678.

[59] *Moseley*, 653 P.2d at 160. The Nevada Supreme Court held that the state's interest in "an expeditious and comparatively unencumbered means of accomplishing estate administration" outweighed the interests of creditors. *Id.*

[60] Continental Insurance Co. v. Moseley, 100 Nev. 70, 683 P.2d 20, 21 (1984).

a probate non-claim statute.[61] Despite the court's lack of analysis upon remand, *Moseley* was very significant because it signalled an end to universal acceptance of constructive notice in probate non-claim statutes.[62]

In the instant case, the United States Supreme Court reasoned that the probate non-claim statute acted to bar the plaintiff's claim,[63] directly and adversely affecting the plaintiff's interest.[64] The Court further reasoned that the plaintiff's claim and related cause of action was a property interest,[65] and that as such, the fourteenth amendment protected such interest from deprivation by state action without due process.[66] Since the non-claim statute would not have been activated without the initiation of probate proceedings in a state court,[67] the Court found the operation of the non-claim statute distinguishable from that of a self-executing statute of limitations.[68] The Court maintained that actual notice was possible with minimal expense and delay,[69] hence, such a requirement would not unduly burden the administration of an estate or encumber the operation of the non-claim statute.[70] Since due process required actual notice to known parties,[71] and because the plaintiff did not receive such notice,[72] the Court reasoned that the non-claim statute denied the plaintiff its right to due process.[73] The Court concluded that constructive notice violates due process;[74] therefore, an executor must provide actual notice of probate proceedings to "known or readily ascertainable" creditors in order to comply with the due process requirements of the fourteenth amendment.[75]

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[61] Falender, *supra* note 17, at 679.

[62] Falender, *supra* note 17, at 678-79. *See* Borron, *Due Process of Law and the Sufficiency of Published Notice*, 8 PROB. L.J. 61, 71 (1985) (suggested, in light of *Mullane*, *Mennonite*, and *Moseley*, due process required actual notice in probate context); Reinwald, *Constitutional Sufficiency of Probate Notice to Creditors*, 20 HA. B. J. 145, 146 (1985) (suggested United States Supreme Court would soon hold publication notice unconstitutional for probate proceedings). *But see In re* Estate of Madden, 241 Kan. 414, 736 P.2d 940, 946-47 (1987) (considered non-claim statute to be statute of limitations).

[63] *Pope*, 108 S. Ct. at 1345. The non-claim statute acted to bar claims not filed within the statutory period after publication notice. *Id.* at 1342. The plaintiff did not file its claim on a timely basis. *Id.* at 1343.

[64] *Id.* at 1346. The Court stated that a proceeding need not "directly adjudicate the merits of a claim in order to 'adversely affect' that interest." *Id.* The expiration of the statutory time period terminated the plaintiff's interest. *Id.* at 1345.

[65] *Id.* at 1344-45; *see* Logan v. Zimmerman Brush Co., 455 U.S. 422, 430-31 (1982) (held claim based upon Fair Employment Practices Act or any other interest grounded in state law to constitute property interest); Martinez v. California, 444 U.S. 277, 281-82 (1980) (held claim for parole to constitute property interest); Goss v. Lopez, 419 U.S. 565, 574 (1975) (found property interest in right to public education); Perry v. Sinderman, 408 U.S. 593, 601 (1972) (contract provision concerning tenure constituted property interest).

[66] *Pope*, 108 S. Ct. at 1345. The Court Stated that "[t]he Fourteenth Amendment protects this interest . . . from a deprivation by state action." *Id.* In *Logan*, the United States Supreme Court stated that, "this question [whether a cause of action is a protected property interest] was affirmatively settled by the *Mullane* case itself, where the court held that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan*, 455 U.S. at 428.

[67] *Pope*, 108 S. Ct. at 1345. Upon appointment by the court, the executrix published notice which activated the non-claim statute. *Id.*

[68] *Id.* The Court distinguished *Texaco* and noted that if private parties use "state procedures with the overt and significant assistance of state officials, state action may be found." *Id.* The intimate involvement of the state court in the process distinguished the

The *Pope* decision will directly impact states with probate statutes

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instant case from *Texaco*, where state involvement ended upon enactment of the statute of limitations. *Id.*; *see* Lugar v. Edmondson Oil Co., 457 U.S. 922, 941 (1982) (deprivation of debtor's property by joint participation of corporation and state officials constituted state action). *But see* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 164-66 (1978) (state sanctioned remedy did not rise to state action without involvement of court or sheriff).

The Chief Justice, in *Pope*, authored a lone dissent in which he took issue with the Court's distinction between the Oklahoma non-claim statute and a constitutionally permissible statute of limitations. *Pope*, 108 S. Ct. at 1348-49. The Chief Justice noted that the probate court's sole involvement in the operation of the non-claim statute constituted appointment of the executor which set in motion a statutory scheme which, in turn, acted to bar the plaintiff's claim. *Id.* at 1349. Such purely administrative involvement failed, in the opinion of the Chief Justice, to rise to the level of state action required to implicate due process. *Id.* The Chief Justice contended that although the non-claim statute was an arguably poor one, its essential features were indistinguishable from the statute upheld in *Texaco. Id.*

[69] *Pope*, 108 S. Ct. at 1347. The Court recognized mail service as an "inexpensive and efficient" alternative to constructive notice which would provide actual notice. *Id.*

[70] *Id.* The Court noted that the Oklahoma Probate Code required actual notice to all "heirs, legatees, and devisees." *Id.* (quoting OKLA. STAT. tit. 58, § 26 (1981)). The Court followed *Mullane* and did not suggest a requirement of actual notice to all parties. *Pope*, 108 S. Ct. at 1347.

[71] *Id.* Known or "reasonably ascertainable" parties must have received actual notice. *Id.*

[72] *Id.* at 1343. The only notice of pending probate proceeding given to the plaintiff was publication notice. *Id.*

[73] *Id.* at 1348. The court remanded the case for a finding of fact as to whether the plaintiff was "reasonably ascertainable." *Id.*

[74] *Id.* The Court stated that constructive notice to known or reasonably ascertainable parties "violated due process." *Id.*

[75] *Id.* Because the Court held the non-claim statute unconstitutional due to its provision for publication notice, it failed to reach the other argument made by the plaintiff. *Id.* at 1346. The plaintiff argued that the time period within which creditors must file claims was "unconstitutionally short." *Id.* The Court also failed to consider the validity of statutes which run from date of death. *Id.*; *see supra* note 17 (discussing statutes which run from decedent's death and cut off creditor's claims).

which require only constructive notice via publication. The affected states include those which adopted the Uniform Probate Code[76] and many of the non-code states.[77] In light of *Pope*, statutes which require publication notice and do not distinguish between known or readily ascertainable parties and unknown parties in determining the notice due are patently unconstitutional.[78] Although scholars predicted immediately after *Mullane* that publication would vanish as a constitutionally valid method of notice,[79] *Pope* affirmed the validity of such notice with respect to unknown or unascertainable parties.[80] Thus *Pope*, although continuing the trend toward the rejection of constructive notice, retained *Mullane's* emphasis on practicality and reasonableness in determining what notice is due.[81] The *Pope* decision failed, however, to reach two important issues concerning the constitutionality of non-claim statutes: whether the time period after notice was too short to satisfy due process[82] and whether statutes which run from the date of death are valid.[83] Although *Pope* will have a far reaching impact on probate non-claim statutes, it is difficult to predict what other non-adjudicatory procedures may fall within its scope. With the expansion of the circle of "state action" invoking due process considerations,[84] however, one area potentially affected by *Pope* is non-judicial, power of sale foreclosure proceedings which require only publication notice.[85] In light of *Pope*, two things appear certain: state legislatures must amend those non-claim statutes which allow publication notice to known or readily ascertainable parties,[86] and courts will continue to wrestle with the constitutional issues not reached in *Pope*.[87]

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[76] UNIF. PROB. CODE § 3-801, 8 U.L.A. 351 (1983). The Uniform Probate Code, as substantially adopted by various states including Alaska, Arizona, Colorado, and Hawaii, provides for a four month period following publication notice for creditors to file claims. *Id.*

[77] *See, e.g.*, ARK. CODE ANN. § 28-50-101 (1987) (three month period following publication notice for creditors to file claims); GA. CODE ANN. § 53-7-02 (1981) (creditor's claim dropped in priority if not filed within three month period after publication notice); MISS. CODE ANN. § 91-7-147 (Supp. 1988) (90-day period publication notice for creditors to file claims).

[78] *Pope*, 108 S. Ct. at 1348.

[79] *See supra* note 30 and accompanying text (predicting an end to constitutional validity of publication notice).

[80] *Pope*, 108 S. Ct. at 1347-48.

[81] *Id.* at 1346; *see Mullane*, 339 U.S. at 314-15 (courts must give due regard to each case's particular fact pattern to determine sufficient notice).

[82] *Pope*, 108 S. Ct. at 1348. The Court ruled on the issue of publication notice and therefore did not reach this issue. *Id.*

[83] *Id.* The Oklahoma non-claim statute did not provide for a time period running from the decedent's date of death; however, the Court acknowledged that many states had such a provision. *Id.*; *see supra* note 17 (discussing non-claim statutes in various states).

[84] *Pope*, 109 S.Ct. at 1345. The Chief Justice, in his dissent in *Pope*, took issue with what he perceived to be a departure from settled law regarding the involvement of the state required to constitute "state action." *Id.* at 1349.

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[85] *See* Leininger v. Merchants & Farmers Bank, 481 So. 2d 1086, 1089-90 (Miss. 1986) (held non-judicial, power of sale foreclosure procedure to be private action authorized by contract and that as such, involved no "state action"). The *Leininger* court did not reach the issue of the sufficiency of publication notice because it found no "state action" present in the foreclosure procedure. *Id.* at 1090. In so doing, *Leininger* followed the majority of jurisdictions which have held that mere statutory authorization of the use of a power of sale provision in a private contract does not create a protected property interest. *Id.* It should be noted, however, that the very notice procedure struck down in *Pope* had received virtually unanimous support among state courts prior to *Moseley*. Falender, *supra* note 17, at 678-79.

[86] *Pope*, 108 S. Ct. at 1348.

[87] *Id.* at 1348; *see supra* note 75 (discussing issues not reached by *Pope*).

CONSTITUTIONAL LAW — CIVIL RIGHTS — FOSTER CHILDREN MAY MAINTAIN CIVIL RIGHTS ACTION AGAINST STATE OFFICIALS FOR DELIBERATE INDIFFERENCE TO THEIR LIBERTY INTEREST

Plaintiff,[1] pursuant to section 1983 of the United States Code,[2] filed suit against Georgia state and county welfare officials[3] in the United States District Court for the Northern District of Georgia.[4] Plaintiff claimed that when defendants placed her in a foster home in which she was physically abused, they were "grossly negligent" and "deliberately indifferent" to rights guaranteed her by the fifth and fourteenth amendments of the United States Constitution.[5] Upon motion by the defendants,[6] the district court dismissed the complaint for failure to state a claim upon which relief could be granted.[7] On appeal, a three judge panel of the United States Court of Appeals for the Eleventh Circuit affirmed the decision of the district court to dismiss the action.[8] On rehearing, the Eleventh Circuit, en banc, *held*, affirmed in part, reversed in part, and remanded.[9] When a state official places a child involuntarily in a foster home in which the child is subject to physical abuse, the child may successfully maintain an action under 42 U.S.C. § 1983 for violation of her fourteenth amendment rights. *Taylor v. Ledbetter*, 818 F.2d 791 (llth Cir. 1987).

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[1] Plaintiff, Kathy Jo Taylor, a minor child placed involuntarily in a foster home, brought this action through her attorney acting as guardian ad litem. Taylor v. Ledbetter, 818 F.2d 791, 792 (11th Cir. 1987)(en banc), *petition for cert. filed*, 56 U.S.L.W. 3290 (U.S. Sept. 25, 1987)(No. 87-521).

[2] *Id.* at 792. Section 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1982).

[3] *Taylor*, 818 F.2d at 792 n.2. The defendant officials were James G. Ledbetter, Commissioner, State of Georgia Department of Human Resources (DHR); Patricia Johnson, Director, State of Georgia Department of Human Resources' Division of Family and Children Services (DFACS); Frederick B. Webb, Director, Gwinnet County DFACS; Sonyonna Stone Danielle, Gwinnet County DFACS; Joanne Hoover, Gwinnet County DFACS; and W. R. Berry, Gwinnet County DFACS. *Id.* These state welfare officials were responsible for plaintiff's custody, supervision, and care. Taylor v. Ledbetter, 791 F.2d 881, 882 (llth Cir.)(panel opinion), *reh'g granted*, 798 F.2d 431, 431 (1986), *modified*, 818 F.2d 791, 800 (1987) (en banc).

[4] *Taylor*, 818 F.2d at 792. Plaintiff sought to recover damages for injuries suffered while in the custody of foster parents. *Id.* at 792-93. Following an order of the Gwinnet County Juvenile Court, the Georgia DHR, DFACS and the Gwinnet County DFACS placed the plaintiff in foster care and assumed the responsibility for the well being of the plaintiff. *Id.* at 792.

[5] *Id.* at 793. Plaintiff argued that state officials failed to inspect and supervise her placement in the foster home resulting in "deliberate indifference" to her right to be free from the infliction of unnecessary pain. *Id.* at 794. The right to be free from the infliction of unnecessary pain is a liberty interest protected by the fifth and fourteenth amendments. *Id.* Plaintiff further alleged that the state's conduct resulted in the deprivation of a legitimate entitlement to benefits. *Id.* at 793. Plaintiff further alleged that the Georgia

As citizens of England, American colonists enjoyed "a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security."[10] It was the intention of the framers of the United States Constitution that the due process clause of the fifth amendment[11] give the inhabitants of their new country "at least the protection against [national] governmental power that they enjoyed as En-

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statutory foster care requirements gave rise to a legitimate entitlement of benefits and that the state's conduct resulted in a deprivation of that entitlement. *Id.* The court determined that although there was an entitlement giving rise to a procedural due process claim, Georgia could change the wording of the statute so as to eliminate such an entitlement. *Id.* at 800.

[6] *Id.* at 793. Defendants contended that the complaint did not support a substantive due process claim. *Id.* Furthermore, the defendant asserted that the Georgia statutory foster scheme did not create an entitlement, claiming it merely set forth procedural guidelines. *Id.*

[7] *Id.* The district court reasoned that the complaint failed to allege facts sufficient to show "deliberate indifference" on the part of the defendants. *Taylor*, 791 F.2d at 883, 884-84. Furthermore, the district court stated that since the Georgia statutory foster care scheme provided only that certain procedural guidelines be followed, then the scheme did not create an entitlement protected by the Constitution. *Id.* at 882.

[8] *Taylor*, 791 F.2d at 882-83. On appeal, the United States Court of Appeals based its reasoning on that of the district court in denying the plaintiff's claims. *Id.* at 882. The panel concluded that the plaintiff failed to plead sufficient facts to establish "deliberate indifference" to her rights. *Id.* at 883. Moreover, the panel concluded that the Georgia statutes did not create an entitlement. *Id.* at 882. However, the Eleventh Circuit ordered an en banc rehearing of the appeal. Taylor v. Ledbetter, 798 F.2d 431, 431-32 (llth Cir. 1986).

[9] *Taylor*, 818 F.2d at 800.

[10] Ingraham v. Wright, 430 U.S. 669, 673 (1977). In *Ingraham*, Justice Powell traced the right to liberty secured by the United States Constitution back to its English roots. *Id.* Relying on 1 W. BLACKSTONE, COMMENTARIES 134, Justice Powell noted that the right to personal security, which the Court held to be contained within our concept of liberty, was recognized in the Magna Carta. *Id.* at 673 n.41.

[11] U.S. CONST. amend. V. The fifth amendment provides that no persons shall be deprived of liberty by the federal government without due process of law. *Id.*

glishmen . . . ."[12] With the ratification of the fourteenth amendment[13] and subsequent judicial interpretations of this amendment, the fundamental right to liberty, including the right of personal security, received extended protection against intrusion by state governments.[14] This fundamental right to liberty has "always . . . been thought to encompass freedom from bodily restraint and punishment."[15] Traditionally, federal courts have utilized section 1983 as a means of interposing themselves "between the States and the people, as guardians of the people's federal rights — to protect the people from unconstitutional action under color of state law . . . ."[16] Congress embodied section 1983 in the Civil Rights Act of 1871[17] in response to concerns about state government complicity in the lawless activities of the Ku Klux Klan.[18] Because of concerns about federalism, however, the courts were slow to expand the meaning of "under color of state law" for purposes of rectifying violations of a broad range of fundamental rights, including the right of liberty.[19]

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[12] *Ingraham*, 430 U.S. at 673; *see* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (liberty right preserved by fourteenth amendment includes right to enjoy privileges essential to orderly pursuit of happiness by free men); Dent v. West Virginia, 129 U.S. 114, 123-24 (1889)(fourteenth amendment requirements derived from English law to protect against arbitrary action of crown). *See generally* Shatluck, *The True Meaning of the Term "Liberty,"* 4 HARV. L. REV. 365, 372-73 (1891) (by time of Edward III, right of personal security protected from deprivation except by due process of law).

[13] U.S. CONST. amend. XIV, § 1. The fourteenth amendment protects the same liberty interest as the fifth, but is applicable where there is action by state governments. *Id.*

[14] *Ingraham*, 430 U.S. at 673 (fifth amendment guarantee that persons not be deprived of liberty by national government without due process of law incorporated into fourteenth amendment); *see, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (right to abortion is protected liberty interest); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to privacy); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (right of parents to raise children).

[15] *Ingraham*, 430 U.S. at 673-74 (citing Rochin v. California, 342 U.S. 165, 174 (1952) (pumping of suspect's stomach held to be unreasonable search)); *see also* Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980) (corporal punishment of students may violate due process if amounts to abuse of official power); Bellows v. Dainack, 555 F.2d 1105, 1106 (2d Cir. 1977) (use of excessive force by police officer during arrest constituted deprivation of liberty without due process).

[16] Mitchum v. Foster, 407 U.S. 225, 242 (1972); *see* Blackmun, *Section 1983 and Federal Protection of Individual Rights — Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U.L. REV. 1, 6 (1985) (discussion of scope of federal protection of individual rights provided by § 1983).

[17] Note, *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1149-56 (1977) (author discussed circumstances surrounding passage of Civil Rights Act of 1871).

[18] *Id.* at 1153-56. The purpose of the Civil Rights Act of 1871 was to suppress Klan activities; *see, e.g.*, CONG. GLOBE, 42nd Cong., 1st Sess. 429 (1871) (remedy necessary because of prejudiced judges and juries); *Id.* at 394 (courts controlled by those inimical to impartial administration of law and equity).

In the 1961 case of *Monroe v. Pape*,[20] the United States Supreme Court broadened the scope of conduct constituting action "under color of state law."[21] The petitioners in *Monroe* alleged that police officers violated their fourth amendment guarantee to be free from unreasonable search and seizure when the officers broke into the petitioners' home without a search warrant, routed them from their beds and made them stand naked while the home was searched.[22] The *Monroe* Court determined that police officers charged with conducting an illegal search could be held liable under section 1983, although their actions were not specifically authorized by state law.[23] The Court concluded that any person carrying a "badge of authority" of a state risked liability if he interfered with the constitutional rights of an individual.[24] However, the *Monroe* decision also served to restrict the scope of section 1983 by narrowly defining the term "person," for purposes of the statute, to exclude municipalities.[25]

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[19] *See* Note, *supra* note 17, at 1133-61 (examining problems of federalism which arose when federal courts sought to adjudicate disputes between states and citizens involving areas of law traditionally relegated to states).

[20] 365 U.S. 167 (1971).

[21] *See* Note, *supra* note 17, at 1169-75 (indicating that *Monroe* brought new life to § 1983 after ninety years of obscurity); *see also* Blackmun, *supra* note 16, at 17-19 (*Monroe* referred to as "watershed" in development of § 1983); Hamilton, *Section 1983 and the Independent Contractor*, 74 GEO. L. J. 457, 463-64 (1985) (broad interpretation of "under color of state law" led to flood of litigation). Prior to *Monroe*, the United States Supreme Court greatly limited the situations in which § 1983 could be invoked. *See, e.g.*, Lane v. Wilson, 307 U.S. 268, 275-77 (1939) (section 1983 action maintained to attack state statute as opposed to conduct of state officials); Nixon v. Herndon, 273 U.S. 536, 541 (1927) (section 1983 used to strike down state statute banning blacks from voting in party primary elections). *But see* Screws v. United States, 325 U.S. 91, 107-08 (1945) (sheriff's fatal beating of prisoner was held to be "under color of state law"); United States v. Classic, 313 U.S. 299, 326 (1941) (expansion of "under color of state law" analysis to include "misuse of power" where wrongdoer clothed with authority of state).

[22] *Monroe*, 365 U.S. at 169. The complaint further alleged that one of the petitioners was taken to the police station and detained on "open" charges for about ten hours. *Id.* While at the station this petitioner was interrogated about a murder and was then released without being charged with any criminal offense. *Id.* The Court recognized that the petitioners could bring an action under § 1983 for violation of the constitutional guarantee against unreasonable searches. *Id.* at 191-92.

[23] *Id.* at 187. Even in the absence of specific authorization, actions of wrongdoers, who are clothed with the authority of state law, constitute actions "under color of state law" within the meaning of § 1983. *Id.* at 184 (citing United States v. Classic, 313 U.S. 299, 326 (1941)); *see* Ramos v. Gallo, 596 F. Supp. 833, 837 (D. Mass. 1984) (excessive force or violence by law enforcement personnel constituted action "under color of state law").

[24] *Monroe*, 365 U.S. at 172.

After the Supreme Court decision in *Monroe*, attention was focused on the availability of section 1983 as a remedy for state violations of civil liberties.[26] Consequently, a flood of litigation erupted challenging actions of states which allegedly violated individuals' constitutional rights.[27] In 1976, the Supreme Court once again expanded the protection offered by section 1983 in *Estelle v. Gamble*.[28] In *Estelle*, a prisoner brought an action under section 1983 in which he alleged that inadequate medical treatment by prison officials constituted cruel and unusual punishment.[29] The Court recognized that incarceration made it necessary for inmates to rely on prison officials for medical care,[30] and that such a reliance gave rise to an obligation on the part of the government to provide this care.[31] The Court acknowledged that failure by government officials to fulfill this obligation constituted "deliberate indifference" to the prisoner's eighth amendment rights.[32]

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[25] *Id.* at 187-92. The Court held that municipalities were not "persons" for purposes of the statute and were therefore immune from liability under § 1983. *Id.* The Court made this determination after reviewing legislative history surrounding the House of Representative's rejection of the "Sherman Amendment" which would have created liability under § 1983 for municipalities which deprived any citizen of his constitutional rights by acts of violence. *Id.*; *see* City of Kenosha v. Bruno, 412 U.S. 507, 513 (1973) (quoting and reaffirming holding in *Monroe* that municipalities were not "persons" for § 1983 purposes). *But see* Note, *supra* note 17, at 1192-93 (criticism of *Monroe's* review of legislative history and discussion of subsequent attempts to hold municipalities accountable under § 1983).

[26] *See* Blackmun, *supra* note 16, at 19-20 (increase in § 1983 litigation after *Monroe*).

[27] *Id.*; *see, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970) (right to notice and hearing prior to termination of welfare benefits); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (section 1983 challenge to prohibition of Vietnam protest armbands); Keyishian v. Board of Regents, 385 U.S. 589 (1967) (challenge to state loyalty oaths); NAACP v. Button, 371 U.S. 415 (1963) (section 1983 used to establish NAACP right to advise blacks of their legal rights).

[28] 429 U.S. 97 (1976).

[29] *Id.* at 99-101. The case was remanded with regard to officials of the Texas prison to determine whether they should be held personally liable for compensatory damages to a prisoner for violation of his rights. *Id.* at 108. The violation resulted from inattention to injuries sustained while on a work assignment. *Id.* at 99-101.

[30] *Id.* at 103.

[31] *Id.*

[32] *Id.* at 104-05. The Court reasoned that since the prisoner had to rely on officials to treat his medical problems, then failure to provide medical assistance when needed would result in his medical needs not being met. *Id.* at 103. The Court recognized that such a failure could, in the worst cases, result in "physical torture and a lingering death" and, in less serious cases, result in "pain and suffering." *Id.* In either instance the result

Thereafter, the Court concluded that such "deliberate indifference" gave rise to a cause of action against prison officials as "persons" under section 1983.[33]

The Supreme Court broadened the scope of section 1983 once again in *Monell v. Department of Social Services of New York.*[34] In *Monell,* a class of female employees alleged that policies of local governments regarding sick leave during pregnancy were unconstitutional.[35] Relying on the lower court's finding that the policies were unconstitutional,[36] the Court recognized that municipalities and local governments were "persons" for purposes of section 1983.[37] The Court concluded that municipalities and local governments could be liable for compensatory damages when their official policies or customs were determined to be unconstitutional.[38] Although *Monell* overruled *Monroe* in part,[39] the Court noted that *Monroe* continued to stand for the proposition that local governments could not be held liable under a theory of respondeat superior for the constitutional torts of their employees.[40]

Subsequently, in the case of *Martinez v. California,*[41] the Supreme Court enunciated the requirement of a "special" relationship between

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would be cruel and unusual punishment violating the prisoner's constitutional rights protected by the eighth amendment. *Id.* at 105-06. Therefore, the government owed a duty to provide medical care to inmates. *Id.* at 103-04.

[33] *Id.* at 105; *see* Green v. McKaskle, 788 F.2d 1116, 1126 (5th Cir. 1986) (no "deliberate indifference" where prison officials failed to provide special bed for handicapped inmate).

[34] 436 U.S. 658 (1978).

[35] *Monell,* 436 U.S. at 660-61. Female employees challenged policies compelling pregnant employees to take sick leave after the fifth month of pregnancy. *Id.* The local governments changed their policies after suit was initiated because of the Supreme Court's prior holding in Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 647-48 (1974) (similar policy determined to be unconstitutional under fourteenth amendment).

[36] *Monell,* 436 U.S. at 662.

[37] *Id.* at 700. The Supreme Court only considered the question of whether local governments were "persons" under § 1983. *Id.* at 690. The Court reasoned that upon reexamination of the legislative history, it was clear that Congress intended local government units to be included among the "persons" to whom § 1983 applied. *Id.* The Court based its conclusion on the premise that there was no unambiguous statement to support the proposition that § 1983 was not applicable to the official acts of a local government. *Id.* at 701.

[38] *Id.* at 700-01. *See generally* Nahmond, *Constitutional Accountability in Section 1983 Litigation,* 68 IOWA L. REV. 1, 1-4 (1982) (expansion of scope of § 1983).

[39] *See supra* note 25.

[40] *Monell,* 436 U.S. at 663-64 n.7. *See generally* International Soc'y for Krishna Consciousness, Inc. v. City of Evanston, 89 Ill. App. 3d 701, 707, 411 N.E.2d 1030, 1036 (1980) (state court defined constitutional tort), *cert. denied,* 454 U.S. 878 (1981).

[41] 444 U.S. 277 (1980).

the state and persons seeking relief under section 1983.[42] In *Martinez*, the plaintiff brought suit under section 1983 for the murder of a girl by a recently released parolee.[43] The complaint alleged that a state statute[44] immunizing public officials who make parole decisions from liability violated her fourteenth amendment rights.[45] The complaint further contended that the parole official deprived the decedent of life without due process of law.[46] The Supreme Court determined that since the statute did not operate to deprive the victim of her life,[47] and since the parole officer was not aware of any "special danger" faced by the victim, then the victim's death was too far removed from the action of the parole officer to make him liable under section 1983.[48] The Court in *Martinez* made clear the requirement of a "special relationship," manifested by personal involvement, in order to substantiate a claim under section 1983.[49] Although there are numerous decisions dealing with children in foster care settings who have been allowed to recover under state common law tort theories,[50] the United States Supreme Court has yet to speak on the availability of section 1983 as an avenue for recovery under such circumstances.[51]

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[42] *Martinez*, 444 U.S. at 284-85 (fourteenth amendment due process challenge to California statute immunizing parole board officials from liability for consequences of parole-release determinations).

[43] *Id.* at 279. Appellant's decedent was a fifteen-year-old girl murdered by a parolee released five months prior to the killing despite his history of sex offenses. *Id.*

[44] *Id.* at 280-81. The Court quoted the statute in dispute which provides in relevant part that:

> Neither a public entity nor a public employee is liable for: (a) any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release.

CAL. GOV'T CODE § 845.8(a) (West 1979).

[45] *Martinez*, 444 U.S. at 279.

[46] *Id.* at 283-84.

[47] *Id.* at 285. The Court analogized the statute involved in this case, which did not authorize the deliberate killing of a person, to a death penalty statute which specifically authorized the taking of a person's life after following prescribed procedures. *Id.* at 281.

[48] *Id.* at 285; *see* Bowers v. Devito, 686 F.2d 616, 618 (7th Cir. 1982) (state officials have no duty under 1871 civil rights statute to protect public from madmen). *See generally* Dollar v. Haralson County, 704 F.2d 1540, 1543 (llth Cir. 1983) (question of whether duty arises in civil rights action is issue of law), *cert. denied*, 464 U.S. 963 (1983); Nahmond, *Due Process, State Remedies and Section 1983*, 34 U. KAN L. REV. 217, 245-47 (1985) (no protection from persons released from custody).

[49] *Martinez*, 444 U.S. at 285; *see* Baker v.McCollan, 443 U.S. 137, 145-46 (1979) (upon claim that sheriff arrested wrong person Court held sheriff had no constitutional duty to investigate every claim of innocence); Rizzo v. Good, 423 U.S. 362, 375-77 (1976) (for court to grant injunctive relief for violation of rights, defendants must have acted affirmatively in committing such violation); Jones v. Phyfer, 761 F.2d 642, 644-45 (llth Cir. 1985) (rape victim failed to establish special relationship which would have created duty on part of state to protect or warn her).

However, in *Doe v. New York City Department of Social Services*,[52] the United States Court of Appeals for the Second Circuit considered the pursuit of a claim under section 1983 by a child placed in a hostile foster care environment by state arrangement.[53] In *Doe*, the complaint alleged that the various forms of child abuse that occurred in the foster home violated the foster child's first, fourth, fifth, ninth and fourteenth amendment rights.[54] The federal appeals court found that the Catholic Home Bureau, used by the state to place children in homes, had affirmative custodial duties, the breach of which could give rise to liability under section 1983.[55] The court reasoned that because of statutory and contractual obligations, the Catholic Home Bureau had a duty to report suspected cases of child abuse.[56] On remand, the trial court ruled in favor of the defendants on a judgment notwithstanding the verdict.[57] Subsequently, on appeal after remand the Second Circuit concluded that since the jury found that the custodial duties were breached, then the Bureau was liable for compensatory damages under section 1983.[58]

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[50] Bradford v. Davis, 626 P.2d 1376, 1380-83 (Wash. App. 1981)(foster child sought to recover damages under tort and contract theories for injuries sustained while in custody of state); Bross, *Professional Liability for Negligence in Child Protection*, 11 LAW, MED. & HEALTH CARE 71, 71-75 (1983)(common law claim for failure to monitor children after placement); Annotation, *Government Tort Liability for Social Service Agency's Negligence in Placement, or Supervision After Placement of Children*, 90 A.L.R.3d 1214, 1214-26 (1979)(legal issue whether or not duty is owed and factual issue whether or not duty is breached).

[51] Donella, *State Foster Care: A Constitutional Mandate*, 19 FAM. L.Q. 79, 87 (1985) (although no Supreme Court ruling, several lower federal court rulings allow recovery under § 1983).

[52] 649 F.2d 134 (2d Cir. 1981), *cert. denied*, 464 U.S. 864 (1983).

[53] *Doe*, 649 F.2d at 134. The Department of Social Services settled the claim, but the contracting agency was held liable because of statutory and contractual obligations that were breached. *Id.*

[54] *Id.* at 136-37. The plaintiff in *Doe* alleged that she was raped, beaten, and forcibly withdrawn from school while in the foster home. *Id.* at 137. Plaintiff contended that the injuries resulted from the foster agency's failure to supervise her placement. *Id.* at 137.

[55] *Id.* at 141. The court said that the Bureau's duties did not end with placement in a home, but instead, state law required the periodical inspection and recertification of the foster home. *Id.* Failure to perform this duty was the basis of the plaintiff's complaint. *Id.*

[56] *Id.* at 137. The court stated that the Catholic Home Bureau was the agency charged with the duty of supervising the plaintiff's foster care. *Id.*

[57] Doe v. New York Dept. of Social Servs., 709 F.2d 782, 787-88 (2d Cir. 1983). The trial judge determined that no reasonable jury could have found that the Bureau acted with "deliberate indifference." *Id.* at 787. However, the judge concluded that if his decision were reversed on appeal, the damage award would be appropriate. *Id.*

While *Doe* was being passed between the district court and the federal appeals court, the United States Supreme Court decided the case of *Youngberg v. Romeo*.[59] *Youngberg* was yet another case where an individual in governmental custody[60] alleged a violation of constitutional rights.[61] The complaint in *Youngberg* alleged that officials of a state hospital failed to prevent injuries to the mentally retarded plaintiff, thus violating his eighth and fourteenth amendment rights.[62] The Supreme Court concluded that a mentally retarded person, involuntarily committed to a state institution, has a constitutionally protected interest in safe conditions of confinement and freedom from bodily restraints.[63] In determining whether the plaintiff's constitutional rights had been violated, the Court balanced the individual's interest in liberty against the relevant state interests.[64] The *Youngberg* Court determined that the rights of an involuntarily committed mentally retarded person were not violated so long as the Court was sure that reasonable "professional judgment" was exercised.[65] This standard is somewhat less than the compelling interest test normally used to determine whether fundamental rights have been violated.[66]

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[58] *Id.* at 787-88. The Second Circuit reversed the trial court's decision, and determined that there was sufficient evidence to support a jury finding that liability existed on the part of the defendant. *Id.*; *cf.* Estate of Bailey v. County of York, 768 F.2d 503, 506 (3d Cir. 1985) (civil rights claim arose when state agency returned abused child to natural mother without investigation).

[59] 457 U.S. 307 (1982).

[60] *Id.* at 309. The plaintiff, a severely retarded man, was involuntarily admitted to a Pennsylvania state facility because his mother was unable to control his violence. *Id.*

[61] *Id.* at 310. The Court stated that plaintiff had been injured due to beatings at least 63 times during a period of approximately eight years. *Id.* The complaint alleged that officials of the state hospital knew or should have known that plaintiff had suffered injuries; furthermore, the failure to institute appropriate preventive procedures resulted in violations of plaintiff's constitutional rights. *Id.*

[62] *Id.* at 318-19. The Court relied on Hutto v. Finney, 437 U.S. 678, 685-88 (1978) for the proposition that a person's constitutionally protected liberty interest was not extinguished by lawful confinement. *Youngberg*, 457 U.S. at 315. *See generally* Kolpak v. Bell, 619 F. Supp. 359, 362-63 (N.D. Ill. 1985) (retarded person beat to death in state institution); Schulz, *Due Process Protection of the Involuntarily Committed Mental Health Patient*, 1 N.Y.U. HUM. RTS. ANN. 287, 291-302 (1982) (discussion of constitutional rights of mentally retarded person in custodial setting).

[63] *Youngberg*, 457 U.S. at 315-16. The Court stated that the mere fact that the plaintiff was committed under proper procedures did not deprive him of all substantive liberty interests under the fourteenth amendment. *Id.*; *see, e.g.*, Vitek v. Jones, 445 U.S. 480, 491-94 (1980) (involuntary transfer of convicted felon to mental hospital must be accompanied by appropriate procedural safeguards).

[64] *Id.* at 320-24; *see* Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (necessary to balance liberty of individual and demands of society). *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW, § 14.1, at 524 (1986) (requirement of compelling or overriding interest on part of government in order to deprive person of fundamental rights).

In *Doe* the foster placement bureau argued that the standard of liability for those charged with the care of foster children should be the "professional judgment" standard as set out in the intervening decision by the United States Supreme Court in *Youngberg*.[67] The Second Circuit in *Doe* disagreed with this contention, however, and concluded that the "deliberate indifference" standard of liability applied.[68] Moreover, the appellate court in *Doe* went on to explain that the "deliberate indifference" standard set out in *Estelle*[69] would be construed even more strictly in a foster care setting than in a prison setting.[70] *Doe* did not clarify whether or not the victim's rights in foster care situations were derived from the eighth or fourteenth amendments.[71] However, the Second Circuit did make it clear that it would require more than a showing of simple negligence as a standard of liability for claims brought under section 1983.[72]

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[65] *Youngberg*, 457 U.S. 307, 321-22. The Supreme Court relied on the standard set out by Chief Judge Seitz in the circuit court opinion. *Id.* Chief Judge Seitz stated that the Constitution required only that "professional judgment" be exercised, and that the courts were not to choose between several professionals' acceptable choices. *Id.* at 321; *see* Gann v. Schramm, 606 F. Supp. 1442, 1448 (D. De. 1885) (court relied on "professional judgment" standard).

[66] *See* Roe v. Wade, 410 U.S. 113, 155 (1973) (compelling governmental interest required to validate government's violation of individual's fundamental right of privacy). *See generally* J. Nowak, *supra* note 64, at § 11.7.

[67] *Doe*, 709 F.2d at 790. The defendants in *Doe* sought to establish that a change in the law had occurred since the first appeal in *Doe* which would have made that decision clearly in error. *Id.* The court disagreed and determined that the law-of-the-case rule applied, entitling the plaintiff to the jury verdict. *Id.*

[68] *Id.*

[69] *Id.*; *see* Estelle v. Gamble, 429 U.S. 97, 104-05 (1975) ("deliberate indifference" standard applied in prison setting).

[70] *Doe*, 649 F.2d at 142. The court stated that the foster care setting differed from the custodial situation involving prisoners because there was a closer relationship between superiors and subordinates in a prison setting. *Id.* In addition, the court stated that prison officials could give orders which were more likely to be followed than directives issued by an agency to a foster family. *Id.*

[71] *Id.* at 136-37. In *Doe* the plaintiff alleged violation of her first, fourth, fifth, ninth and fourteenth amendment rights. *Id.* However, on appeal after remand the court appeared to convey that the standard used derived from the eighth amendment. *Doe*, 709 F.2d at 141-47.

[72] *Doe*, 649 F.2d at 143 (ordinary negligence alone cannot establish cause of action

In the instant case, the Eleventh Circuit recognized that the right to be free from the infliction of unnecessary pain and the right to personal security are liberty interests[73] protected by the fifth and fourteenth amendments.[74] The court went on to state that persons involuntarily committed to a custodial setting have a recognized liberty interest in the safety of their environment.[75] Therefore, since the plaintiff was involuntarily committed to a custodial setting,[76] and was unable to seek alternative living arrangements, she had fourteenth amendment substantive due process rights to reasonably safe living conditions.[77] Moreover, the court stated that where a state assumed the responsibility of providing a safe environment for a foster child,[78] failure to fulfill that obligation operated to deprive the child of a liberty interest.[79] Thus, the Georgia state officials' failure to act was a

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under § 1983); *see* Davidson v. Cannon, 474 U.S. 344, 347 (1986) (mere negligence on part of government official which violates individual's rights does not require compensation); Jensen v. Conrad, 570 F. Supp. 114, 121 (D.S.C. 1983) (negligence not enough to support 1983 action). *See generally*, Snyder, *Legal Liability: The Social Worker and Juveniles*, 6 Children's Legal Rts. J. 6, 10-14 (1985). *But cf. Doe*, 649 F.2d at 143 n.3 (United States Supreme Court has not yet spoken on issue of whether simple negligence is sufficient to support claim for damages under § 1983).

[73] *Taylor*, 818 F.2d at 794. The court stated that the right to personal security was a "historic liberty interest." *Id.* at 795; *see Youngberg*, 457 U.S. at 315 (mentally retarded child, involuntarily committed to Pennsylvania state institution, had constitutionally protected liberty interest in personal security); Ingraham v. Wright, 430 U.S. 651, 674 (1977) (although liberty interest in personal security was recognized, notice and hearing not required for administration of corporal punishment in public schools where procedural safeguards existed).

[74] *Taylor*, 818 F.2d at 794. The court relied on the language of the fifth amendment which provides that no person shall be deprived of liberty without due process of law. *Id.*

[75] *Id.* at 794-95. The court relied on *Youngberg* for the proposition that merely because a person is committed to a custodial setting, he is not deprived of all substantive liberty interests under the fourteenth amendment. *Id.*

[76] *Id.* The court analogized the plaintiff in foster care to a mentally retarded child involuntarily committed to a state institution for the proposition that the foster child had a recognized liberty interest. *Id.*

[77] *Id.* at 794. The court relied on *Youngberg* for the proposition that a person involuntarily committed to a custodial setting could recover damages for violation of his liberty interest. *Id.* at 795.

[78] *Id.* at 795. The court reasoned that the primary objective of placing the child in the foster home was to protect the child. *Id.* Furthermore, by attempting to place children in a safe environment, the state assumed the responsibility of maintaining that environment. *Id.*

[79] *Id.* at 795. The court concluded that since personal security was a constitutionally protected right and since the state assumed the duty of keeping the child safe, then a breach of that duty constituted a deprivation of liberty under the fourteenth amendment. *Id.*

substantial factor in the violation of a constitutionally protected liberty interest of the plaintiff;[80] since the officials displayed "deliberate indifference" to the protection of that interest,[81] an action could be maintained under section 1983.[82] Furthermore, the court stated that where the risk of harm to the child was so great,[83] she should be brought under the "penumbra of protection" provided by the fourteenth amendment.[84] Finally, the court concluded that the special relationship between state officials and a child involuntarily placed in a foster home was analogous to situations involving both prisoners in penal institutions and children in mental institutions,[85] so that the foster child could bring an action under section 1983 for violation of fourteenth amendment rights.[86]

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[80] *Id.* The court reasoned that the Georgia state officials' failure to act breached the obligatory duty to maintain a safe environment for the child and was a substantial factor in the violation of the child's rights. *Id.*

[81] *Id.* The court stated that to show "deliberate indifference" in the foster home setting the plaintiff had to prove that the officials had actual knowledge of physical abuse in the home or that the agency deliberately failed to determine what was occurring in the foster home. *Id.* at 796. "Deliberate indifference" could not easily be inferred from a mere failure to act. *Id.*

[82] *Id.* The court recognized that since the officers were further removed from the victim in a foster setting than in a prison setting, then it would be more difficult to prove "deliberate indifference" in the foster setting. *Id.* The court stated that in order to bring an action under § 1983, there must have been action or inaction which was a substantial factor in the violation of a constitutionally protected interest. *Id.* at 794; *see* Rizzo v. Good, 423 U.S. 362, 375-77 (1976) (must be some act which violates rights). In addition, the court stated that the act or omission must have amounted to "deliberate indifference." *Taylor*, 818 F.2d at 796; *see* Turpin v. Mailet, 619 F.2d 196, 202 (1980) (requirement of "deliberate indifference"), *cert. denied*, 449 U.S. 1016 (1980).

[83] *Taylor*, 818 F.2d at 797. The court noted that recent events in the foster home setting led the court to the conclusion that the risk of harm to foster children was high. *Id.*

[84] *Id.* The court determined that since the risk of harm to foster children was high, then a showing of "deliberate indifference" on the part of officials would constitute a violation of fourteenth amendment rights. *Id.*

[85] *Id.* at 797-98. The court noted that special relationships may support an action under § 1983. *Id.* at 798; *see* Fox v. Curtis, 712 F.2d 84, 88 (4th Cir. 1983) (no special relationship established to support § 1983 action by rape victim against parole officer); Bowers v. Devito, 686 F.2d 616, 618-19 (7th Cir. 1982) (doctor at state institution owed no duty to protect general public from madmen). The court analogized the circumstances in *Taylor* to the custodial prison setting in *Estelle. Taylor*, 818 F.2d 795-96; *see* Williams v. Bennett, 689 F.2d 1370, 1388-89 (llth Cir. 1982) (prisoner in custodial setting), *cert. denied*, 464 U.S. 932 (1983). The court also analogized *Taylor* to the mentally retarded child in a custodial setting as found in *Youngberg. Taylor*, 818 F.2d at 795.

[86] *Taylor*, 818 F.2d at 797. The court did not consider the issue of immunity of defendants. *Id.* at 797; *see* Doe v. New York City Dept. of Social Servs., 649 F.2d 134,

Three judges joined in Circuit Judge Tjoflat's minority opinion wherein he dissented from the court's reasoning that Georgia state officials were "deliberately indifferent" to their duties.[87] The dissent contended that the plaintiff failed to meet the heavier burden required for a showing of "deliberate indifference."[88] Furthermore, the dissent did not believe that the majority opinion could be reconciled with an earlier United States Supreme Court decision requiring personal participation in the infliction of injuries.[89] Finally, the dissent disagreed with the finding of a legitimate entitlement.[90]

Until the United States Supreme Court enunciates the obligatory rights and duties in the custodial foster care setting, the standard of liability for balancing interests will remain unclear.[91] The effect of *Taylor* is to set another precedent in which the lower federal courts recognized the constitutional right of foster children to liberty in a custodial setting.[92] It is clear from pre-*Taylor* case law that where the state is in custody of an individual, an obligation or duty arises whereby the state must be sensitive to the constitutional rights of the individual.[93] The existence and extent of an obligation is a legal issue which must be determined by the court.[94] The courts have used balancing tests to determine whether violations of fundamental rights

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152 (2d Cir. 1981) (foster child recovered under § 1983 for violation of fourteenth amendment rights).

[87] *Taylor*, 818 F.2d at 809 (Tjoflat, J., dissenting). Circuit Judge Tjoflat wrote the dissenting opinion in which Chief Judge Roney and Circuit Judge Hill joined. *Id.* The dissent suggested that the majority drew an erroneous analogy between the facts in *Taylor* and those outlined in *Doe. Id.* at 810.

[88] *Id.* at 815. Reiterating the difference between a foster care situation and a prison situation, the dissent stated that the plaintiff had failed to meet the heavier burden of showing "deliberate indifference" as set out in *Doe. Id.*

[89] *Id.* at 810. The dissent contended that the majority opinion was not in accord with the decision in *Martinez. Id.* The dissent recognized that in *Martinez* the United States Supreme Court required that there be a personal participation in the infliction of injuries. *Id.* at 812. Since the plaintiff did not allege that personal participation of the defendants resulted in injuries to her, then the dissent concluded that the outcome suggested by the majority was in conflict with the dicta in *Martinez. Id.* at 810.

[90] *Id.* at 819. The dissent agreed with the defendant's position that the Georgia statutory foster care scheme did not create legitimate entitlements, being merely procedural guidelines. *Id. See generally*, Board of Regents v. Roth, 408 U.S. 564, 576-80 (1972) (right of professor to be rehired not regarded as entitlement).

[91] *Doe*, 709 F.2d at 790; *see* Fox v. Custis, 712 F.2d 84 (4th Cir. 1983) (duty *may* arise out of custodial relationship).

[92] *See supra* notes 53, 58, 86 and accompanying text.

[93] *See supra* notes 32, 55, 62 and accompanying text.

[94] *See supra* notes 48, 50 and accompanying text.

have occurred.[95] The United States Courts of Appeals for the Second and Eleventh Circuits agree that in the foster care setting the balancing should include the amount of "deliberate indifference" displayed by the custodian.[96] Moreover, this standard should be gauged by the relative amount of contact between the parties involved in the custodial relationship.[97]

In *Monroe* and subsequent decisions, the Supreme Court expanded the scope of section 1983 by broadening its interpretation of "persons" and "under color of state law."[98] However, the Court has attempted to keep some restrictions on liability under section 1983 by requiring a "special relationship" or action with "deliberate indifference."[99] The Supreme Court has recognized the rights of an individual in governmental custody.[100] Thus, since foster children are in governmental custody, it logically follows that their rights must be recognized and protected.[101] The more strictly construed "deliberate indifference" standard would serve to protect those rights while somewhat restricting the liability of government officials.[102]

Because of the increasing amount of child abuse in the foster care setting, it is time for the Supreme Court to address this issue more clearly and outline the degree to which foster children can expect protection by their custodians in regard to constitutional rights.[103] *Doe* and *Taylor*, while not bearing the authority of a United States Supreme Court decision, seem to signal that section 1983 will provide a safe harbor for the protection of the constitutional rights of foster children.[104]

Duke Selph

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[95] *See supra* notes 64, 66 and accompanying text.

[96] *See supra* notes 70, 88 and accompanying text.

[97] *See supra* note 70 and accompanying text.

[98] *See supra* note 21, 37 and accompanying text.

[99] *See supra* notes 68-70, 88 and accompanying text.

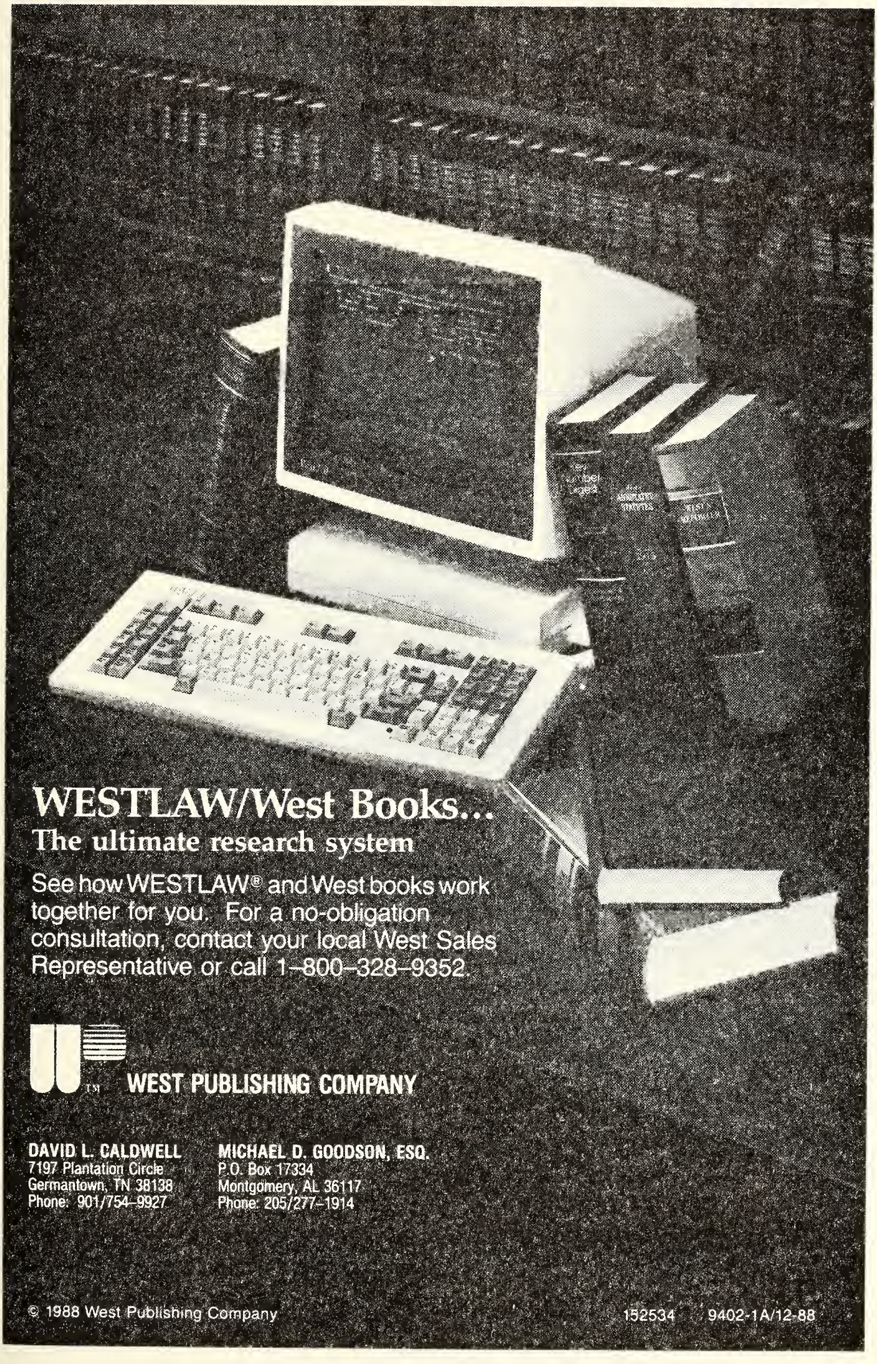
[100] *See supra* notes 32, 62 and accompanying text.

[101] *See supra* notes 32, 62 and accompanying text.

[102] *See supra* note 70 and accompanying text.

[103] *See supra* notes 56, 58 and accompanying text.

[104] Doe v. New York City Dep't of Social Servs., 709 F.2d 782 (2d Cir. 1981); Taylor v. Ledbetter, 818 F.2d 791 (llth Cir. 1987).



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SYMPOSIUM ON EDUCATION

FOREWORD

The *Mississippi Law Journal*'s Symposium on Education provides a collection of articles on a broad range of legal issues facing the education community, parents and students. From Governor William Winter's historical analysis of the *Development of Educational Policy in Mississippi* to Judge Constance Baker Motley's historical perspective on *Desegregation and Education* to Freeland, Freeland & Wilson's article on equity funding, the symposium encompasses the roots of our present system as well as the cutting edge of emerging legal issues.

In the last presidential campaign there was a great deal of debate heralding education as the "issue of the 1990s." As we all know, education is not and should not be an issue whose popularity fades with the passage of time. In order for our state to progress in the areas of economic development, health care, the reduction of crime or virtually any area of social concern, education is the key. Our efforts to make sure all Mississippi children receive a quality education must not cease. We must vigorously search out new ideas and ways of teaching students the skills they must have to compete in a rapidly changing world.

The Symposium on Education examines and tackles issues facing policy makers and educators. Each article focuses on an area of the law by examining the historical development of a particular problem or legal issue. Most importantly each writer raises questions about the future and often supplies potential solutions. Sometimes asking the right question is as critical as finding an answer. By framing and thoughtfully examining ideas, the articles collected here help illuminate the paths we must pursue.

Dr. Robert J. Beebe's article on the *Legal Status of Functional Literacy Examinations* provides a valuable discussion of the use of functional literacy tests as a measurement of how well efforts to reform public education have succeeded. James A. Keith has distilled into an excellent article, *Aids in the Class-*

room, the statutory, judicial and administrative material. Oxford attorneys, T.H. Freeland, III, T.H. Freeland, IV, and Tim Wilson, collaborated to produce an insightful and thought-provoking article on the history of equitable funding in Mississippi and potential legal challenges to inequities in funding of school districts. This analysis is particularly timely in light of recent action by the legislature addressing the problem. Carolyn Ellis Staton contributes an overview and analysis of federal statutory and constitutional provisions that provide protection to students and school employees from discrimination on the basis of sex. An article by Owen T. Palmer, Jr. examines the history and future of sovereign immunity for our state's school districts.

I commend the *Mississippi Law Journal* and particularly the Symposium Editor, Dinetia Newman, for encouraging some of our state's best minds to turn their thoughts and skills to this most important topic.

Governor Ray Mabus

DEVELOPMENT OF EDUCATIONAL POLICY IN MISSISSIPPI

*William F. Winter**

A review of the development of public education policy in Mississippi is not an easy or exact exercise. One's first impression is that over the course of our two hundred-year history public opinion has not always been on the side of public education or, at least, of quality public education. There is much anecdotal evidence to support that conclusion. For generations there was no perceived need for more than a cursory introduction to formal education in a society that was largely rural and agricultural. If this attitude prevailed in the white community, its effect in the black population was incredibly more abysmal.

The first official recognition of the need for a state-wide system of public education in Mississippi is found in the inclusion of an article in the Constitution of 1869 providing for a state superintendent of education, an ex-officio board of education and a four-month annual school term.[1] The same article, only slightly modified, was later adopted as a part of the Constitution of 1890.[2] One significant addition was a provision calling for separate schools for whites and blacks.[3]

Despite able leadership from those early state superintendents who constantly goaded the legislature into giving support to public schools, the state's resources were so limited, its economy so agricultural, and its resistance to any significant change at the local levels so great that no meaningful progress in the improvement of the education of the masses of Mississippi children occurred in those latter years of the nineteenth and early years of the twentieth century. During this period financial support for public education came in relatively modest amounts from tuition, local tax levies, Chickasaw Session revenues, Sixteenth Section funds and a general appropriation made by the legislature.[4]

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[1] Miss. Const. of 1869, art. VIII.

[2] Miss. Const. art. VIII.

[3] *Id.*

Beginning with the action of the 1910 session of the legislature creating in Hattiesburg a normal college for teacher training and setting up a school consolidation and transportation system, the state slowly began to move toward a more effective program.[5] Seven years later a system was established to emphasize vocational training.[6]

It was in the consolidation of rural schools that the fiercest and most violent opposition to education developed. W.F. Bond, who served as state superintendent of education during these early consolidation efforts, reports in his memoirs the problems that he confronted:

> In order to establish these better schools we had to get the people not only willing to give up their local schools in many instances, but also willing to pay taxes to lengthen the school term, to build larger and better school buildings and to pay for the transportation of the school children living too far from the new school building to walk. Many good citizens thought the school that had been good enough for them and their parents was good enough for their children. In many instances the fight was carried into the courts and sometimes even to the Supreme Court of the State. Several new school buildings were burned, some more than once.[7]

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[4] 2 L. McLemore, A History of Mississippi 396 (1973).

[5] *Id.*

[6] 1910 Miss. Laws ch. 119 (codified at Hemingway's 1917 § 6078).

[7] W. Bond, I Had a Friend 98 (1958). Bond recounts at considerable length the difficulties of securing convictions in such cases. He recalled one in particular where bloodhounds were used to track the accused. The defense attorney's argument which resulted in an acquittal was quoted as follows:

> Your honor, this man's wife has sworn that he was at home all night on which night the school building was burned. All the evidence you have against my client is that the bloodhounds picked up a trail on the school grounds and came to this man's house. On the one hand, we have the testimony of one of the finest, most truthful and lovable women in this whole county who says that this man is innocent. On the other hand, your honor, what do we have against

The question of equity funding has always been and remains a major problem in seeking to equalize educational quality. Efforts at providing additional support for poor districts were made as early as 1912. The legislature in that year appropriated the magnificent sum of five thousand dollars to aid the poorer counties.[8] However, in the following year the Mississippi Supreme Court declared the supplemental funding procedure unconstitutional in *State Board of Education v. Pridgen.*[9]

In the meantime, the state constitution was amended in 1914 to provide for a procedure of initiative and referendum.[10] Under this authority, a petition was filed in 1919 proposing an amendment to section 206 of the constitution that would overrule the *Pridgen* case and permit the legislature to make appropriations to equalize educational efforts. While that amendment passed overwhelmingly, in a subsequent unrelated case three years later, the supreme court voided the initiative and referendum section, thus invalidating the process whereby the 1919 amendment was added.[11] However, in a case specifically addressing the issue of equalization, the court by a four to two vote effectively reversed *Pridgen* and gave sanction to the equalization of schools.[12] That funds have not yet been equalized attests to the complexity and pervasiveness of the problem.

The battles against consolidation created a generation of lawsuits that occupied the attention of the courts over a period

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the testimony of this good woman, nothing but the action of two dogs.

Id.

[8] 1912 Miss. Laws ch. 5. This legislation allowed counties to use the funds when the money provided under the general apportionment formula was insufficient to cover the expenses of operating schools for the constitutionally mandated four month term.

[9] 106 Miss. 219, 63 So. 416 (1913). The *Pridgen* court held that the apportionment formula set forth in the constitution was to be the sole method of distributing state funds for education. *Id.* at 233, 63 So. at 418.

[10] 1914 Miss. Laws ch. 520 (amendment to Miss. Const. § 33). In this attempt to amend § 33 of the Mississippi Constitution, the legislature maintained that in granting to the legislature the power to make laws, the people of the state reserved unto themselves the right to formulate law through initiative and referendum. *Id.*

[11] *See* Power v. Robertson, 130 Miss. 188, 93 So. 769 (1922) (holding that power to amend constitution was never allocated to legislature).

[12] *See* Miller v. State *ex rel.* Russell, 130 Miss. 564, 94 So. 706 (1922) (holding constitution's funding formula was minimum standard which, once met, could be ignored in distributing educational funds).

of more than twenty years. Repeated challenges to the constitutionality of the legislative enactments relating to consolidation were raised in a myriad of cases beginning with *Bufkin v. Mitchell*[13] in 1913. Generally, the courts favored interpretations of the constitution and the statutes that resulted in the mergers of schools. The legislature aided the process by adopting various curative acts that eliminated objections to irregularities in the legal proceedings.

In addition to the efforts at consolidation and equalization, the most significant developments in the years between the two World Wars were the recognition of certain basic standards of accreditation for both secondary and elementary schools and the passage in 1940 of legislation providing free textbooks for students.[14] Despite modest advances, national surveys still revealed many deficiencies; particularly in the rural schools and in almost all of the woefully inadequate black schools. It was not until the early 1950's that major new initiatives were proposed.

While it is probable that this effort would have been undertaken in any event, its urgency was amplified by increasing concern among the state's political leaders over the prospect that the separate school systems for whites and blacks that had enjoyed legally sanctioned status under the rule of *Plessy v. Ferguson*[15] would be eliminated by the United States Supreme Court.

At the 1952 session of the legislature a concurrent resolution was adopted creating a special committee to study the state's school needs and make recommendations for appropriate action.[16] This official action followed a year-long survey of public education by business and professional leaders. That group, known as the Mississippi Citizens' Council on Education (not to be confused with the segregationist White Citizens' Council), made a series of sweeping recommendations regarding the reorganization of public education in the state. Significantly, included in the recommendations was an unprecedented increase in taxes to fund the changes which the group felt were essential.

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[13] 106 Miss. 253, 63 So. 458 (1913)(holding that when consolidating rural schools it was not improper diversion of school funds to use them in busing students to central location). *See* Bullock v. Sanford Consol. School Dist., 153 Miss. 476, 121 So. 267, 271 (1929) (holding that in passing general law ratifying creation of all school districts legislature gave tacit approval of location of school buildings, which therefore were not required to be moved merely because school districts were redrawn); Board of Supervisors v. Brown, 146 Miss. 56, 111 So. 831, 832 (1927) (failure of school board to designate location of school house held fatal to creation of consolidated school districts); King v. Board of Supervisors, 133 Miss. 494, 97 So. 811, 812 (1923) (statute authorizing consolidation of school districts held not unconstitutional as violative of due process, since it provided for notice to and hearing of taxpayers in such districts).

[14] 1940 MISS. LAWS ch. 202 (codified at 1930 Code § 6634-6658).

[15] 163 U.S. 537 (1896). In Plessy v. Ferguson, the United States Supreme Court held that the act requiring that white and black train passengers be provided separate accommodations did not violate the due process, privileges and immunities, or equal protection clauses of the fourteenth amendment, thereby establishing the 'separate but equal' doctrine.

The work of the legislative committee represented the first systematic effort to examine the state of public education in Mississippi. It is the point of beginning for this discussion of the formulation of our state's educational policy. To understand this process it is necessary to remember whence we have come since that time.

Prior to the 1950s there had been little or no thought given to the maintenance of a "separate but equal" school system under the long-established prerogatives laid down in the *Plessy* decision. The word "separate" was emphasized to the almost total omission of the word "equal" with appalling results. It was found, for instance, that only one white child in four and one black child in forty were graduating from high school.[17] Although the committee was composed of Mississippi legislators who were committed to a racially segregated society, it delivered this shocking declaration:

> The condition of Mississippi's schools for Negroes in rural areas is pathetic and in some cases it is inexcusable.
>
> Hundreds of children of the Negro race are compelled to attend school - if they attend at all - in unpainted, unheated and unlighted buildings that are not fit for human habitation and should have been condemned many years ago.
>
> There are very few rural schools for Negroes in Mississippi that have sanitary drinking water facilities or sanitary toilet

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[16] 1952 Miss. Laws H.C.Res. 32.

[17] RECESS EDUCATION COMMITTEE, REPORT TO THE 1953 MISSISSIPPI HOUSE 16 (1953). The comparison is even more tragic when one considers the inferiority of the education received by black high school graduates.

> facilities.
>
> According to the report of the State Auditor, copies of which are on file in the records of this committee, in many counties money specifically appropriated for equalizing the pay of Negro teachers which was sent to the counties for that purpose never got to the Negro teachers. For that matter, it has never been returned to the State Treasury, either. The Committee does not know for what purpose the money was spent.[18]

If conditions were deplorable in the black schools, they were far from ideal in the white. Commenting on the fact that Mississippi had more than 500 separate statutes pertaining to public education, the committee reported that the system was operating under "a hopeless patchwork of laws that are difficult to interpret and equally difficult to administer."[19] The study further revealed that in spite of a generation of consolidation efforts, the state had at least 2,079 different school districts, about twenty-five per county. Most other southern states had fewer than 200. Approximately one-half of all the schools in the state had no more than two teachers.[20]

In terms of public expenditures for education, the story was equally depressing. In the school year 1951-52, Mississippi invested the sum of $67.00 per pupil against a national average of $180.00. Much of this deficiency was found to be at the expense of black students. The differential in Tunica County, for example, was reflected in the figures of $270.00 for whites and $21.00 for blacks. In few districts was the disparity less than four to one.[21]

It is not surprising, therefore, that the Committee viewed with understated apprehension the cases pending before the United States Supreme Court challenging the "separate but equal" doctrine. That concern was expressed in the call for quick action in upgrading the state's obviously inadequate and unequal system of education. Significantly, the report emphasized what it characterized as a "public interest [that] has been and is now aroused in the educational problems of this state."[22] That the motivation may have been the pending *Brown*[23] decision did not detract from the importance of the reforms that the Committee was recommending.

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[18] *Id.*

[19] *Id.* at 14.

[20] *Id.*

[21] *Id.* at 113.

The Committee went far beyond the immediate issue of "separate but equal," and its efforts represented a sweeping revision of the structure of public education in the state. Never before had so thorough a modernization of the system been attempted by the Mississippi legislature. The recommendations addressed the issues of consolidation, governance, financing, physical facilities and curriculum.[24]

Eventually enacted in a special session called by Governor Hugh White in the fall of 1953, the Minimum Foundation Program, as it came to be known, embraced the major proposals of the Committee report.[25] At the heart of the process was the elimination of the outdated equalization method of funding and the substitution of a formula that applied uniformly and that had the effect of substantially increasing the state's commitment. At the same time a mandate for a major consolidation effort was voted along with a state subsidy to launch a massive new building program. Here the essential factor was a requirement that no county could qualify for the new building funds until it had submitted an acceptable consolidation plan to the state agency, known as the Education Finance Commission, created specifically to oversee the difficult and vexing process of consolidation. While no one has suggested that the concept was flawless, it did serve to reduce the number of school districts from almost 3,000 to fewer than 200.[26]

Two other recommendations that were contained in the original report, although later withdrawn by the committee under public pressure, involved the appointment rather than the election of the state superintendent and the county superintendents of education. Had these proposals been approved at that time, there is every reason to surmise that our present system of education would be further along the way to excellence.

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[22] *Id.* at 51.

[23] Brown v. Board of Education, 347 U.S. 483 (1954). For a thorough examination of the *Brown* decision and its aftermath see J. H. WILKINSON, FROM BROWN TO BAKKE (1979).

[24] *Report, supra* note 17, at 16.

[25] 1953 MISS. LAWS ch. 14 (codified at 1942 Code § 6248-01).

[26] *Id.*

While the basic substantive reforms were enacted in the fall of 1953, it would be another year and a half before the new revenue would be provided to make it fully operational. In the meantime, the 1954 *Brown* decision exploded like a fireball over a state whose white leadership had vowed eternal resistance to racial integration of its public schools. The development of school policy now took an ominous and ugly turn. With the Minimum Foundation Program partially enacted, but with funding deferred, another special session met in September, 1954, to consider the options. It lasted three weeks and consisted primarily of a series of irate speeches bashing the United States Supreme Court. The principal accomplishment was the passage of a constitutional amendment repealing the state's obligation to provide public schools for its children and conferring on the legislature the specific authority to abandon them if it saw fit.[27] It was not public education's finest hour.

However, with the amendment overwhelmingly ratified in a special December referendum, its approval operated as a pressure release valve that enabled the legislature to enact the tax bills necessary to put the Minimum Foundation Program into full effect.[28] There followed more than a decade of belated and sometimes frantic efforts at "equalizing" what was obviously a doomed system of dual education.

Despite the preoccupation with the maintenance of the segregated status quo, and in the face of an increasing number of lawsuits against individual districts, there were encouraging signs. The most visible progress was in the improvement of physical facilities and in the consolidation and reorganization of districts.

The widespread predictions that the *Brown* decision would spawn a generation of litigation were correct. What was not anticipated by white Southerners was the ultimate commitment of the federal courts to insure compliance. Every conceivable device to delay or overturn the effect of the decision was thrown onto the strategy table. The principal effort was based on a course that would rely on continuing freedom of choice. This obviously was deemed preferable to forced integration by specific court order. The problem was that, for a variety of reasons, it was not producing any substantial desegregation. In the meantime, almost every school district in the state found itself embroiled in what appeared to be an unending series of legal battles. The decisions that resulted are too numerous to be referenced in this article. Suffice it to say that it was the most litigious era in the history of public education. That the thorniest of these issues have now largely been resolved reflects great credit on an entire generation of school officials, judges, and lawyers as well as on our system of jurisprudence that was threatened to be inundated by the sheer volume and intensity of the litigation stemming from *Brown*.

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[27] 1954 Miss. Laws ch. 39 (extraordinary session)(amendment to Miss. Const. § 213-B).

[28] 1955 Miss. Laws ch. 46 (codified at 1942 Code § 6248-12).

After more than fifteen years of delay and uncertainty in school desegregation, by 1970 the federal courts would brook no further token compliance. The orders decreed the elimination of all artificial barriers and mandated widespread busing, pairing of schools and other similar devices to achieve maximum integration.[29] In many areas there was a wholesale withdrawal of white students from the public schools, with the corresponding establishment of private segregated academies. Following the January, 1970, court orders, it is estimated that some 50,000 white students left the public schools, and approximately 1,000 teachers resigned from thirty school districts.[30] In a few districts, such as Wilkinson County, virtually all of the whites abandoned the public schools. This was followed by a reduction in local taxes for the support of public education.

The decade of the 1970s marked the period of greatest testing of the state's system of public education. Only through the dedicated and largely unheralded efforts of many professional administrators, teachers and board members was a viable program maintained in the face of the countless dislocations and diminished public support. Still, despite the unrest in many areas, there persisted an overall public commitment to make the system work. Even after the whites' withdrawals, the public schools accounted for more than ninety per cent of total enrollment.

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[29] *See, e.g.*, Singleton v. Jackson Mun. Sep. School Dist., 426 F.2d 1364 (5th Cir. 1970) (court rejected "desegregation" plan for Jackson, Mississippi which had resulted in 17 of 38 schools having 90% or more black students).

[30] Jackson Clarion Ledger, Nov. 29, 1982, at A-1.

Nevertheless, as the state entered the 1980s, there was an obvious decline in morale among teachers and administrators who, having made the transition to a totally desegregated system, now saw a program continuing to be grossly underfunded and not performing in a nationally competitive way. Most of the indicators reflecting student achievement did not shine favorably on Mississippi.

At the 1980 session of the legislature these problems were recognized with the creation of an official task force to develop a program of educational reform.[31] This group, organized to some extent along the lines of the 1952 committee, also included business, professional and educational leaders as well as legislators. Jack Reed of Tupelo was named as chairman.

The Committee made its report to the governor and the legislature on December 15, 1980.[32] It suggested sweeping reforms. Among the more important recommendations were these:

1. Fiscal independence for all school districts,
2. Statewide kindergartens,
3. Compulsory attendance law,
4. School bond issues to require only majority approval,
5. Strengthened criteria for teacher certification,
6. Increased salaries for teachers and administrators.[33]

In addition to these educational programs, the panel recommended a major tax increase to fund the reforms and suggested sources of revenue. Unfortunately, it was not the best of economic times. The country had plunged into a major recession, unemployment in the state had moved above ten per cent, and the political mood following the election of President Ronald Reagan opposed raising taxes. The economic and educational projections for the state were bleak.

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[31] 1980 MISS. LAWS ch. 618.

[32] SPECIAL COMMITTEE ON PUBLIC SCHOOLS FINANCE AND ADMINISTRATION, REPORT TO THE LEGISLATURE (1980).

[33] *Id.*

The result was that at neither the 1981 nor 1982 regular sessions were the recommendations of the report approved. Because of the continuing recession there was not even the customary token increase in salaries at the 1981 session.

At about the same time a report of the Southern Regional Education Board further focused on the deficiencies in the South. Mississippi, as usual, did not fare well by comparison. The report drew attention to the need for improvement in education as a precursor for Southern students to compete in the more demanding global job market.

Even the newly-elected Reagan administration, although elected on a platform to eliminate the U. S. Department of Education, began to focus on the problems. Secretary of Education Terrell Bell promptly dismissed as absurd the idea of abolishing his Department and turned instead to the formation of a task force to begin the process of reform. The result was the dramatically effective 1983 report, "A Nation at Risk," that later served as a handbook on educational change.

In the meantime in Mississippi, although the report of its own legislative committee had been largely ignored, the 1982 session did approve a constitutional amendment that would replace the ex-officio State Board of Education with a larger lay board and that would provide for an appointed State Superintendent of Education instead of an elected one.[34] It was considered by many observers that the approval in a November referendum of this amendment was critical to the success of any future reforms. A campaign to adopt the amendment was launched in the summer of 1982.

Concurrently with this effort a special initiative was undertaken by the Governor's office to fine-tune the recommendations of the 1980 committee and to develop a special program that would again be presented to the legislature. A group of professional educational consultants from State Research Associates of Lexington, Kentucky, was employed to put this package together. At the same time, a massive citizen support campaign was organized that would reach a climax just before the November vote on the constitutional amendment. The approval of the amendment was regarded as a signal that the state was serious about educational reform. The results were gratifying, with the amendment being approved by a vote of 219,973 to 203,005.

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[34] 1982 MISS. LAWS ch. 616 (amendment to MISS. CONST. § 202).

The stage was now set for action. Despite pleas to hold off until the regular session, the Governor convened a special session to deal solely with education. The major recommendations were based on the findings of the 1980 committee and on the 1982 report of the special consultants. The latter report was the most comprehensive and detailed of any ever undertaken in the state.

While cautioning against an unfair reaction to a lack of educational progress in the state, the report, which was cited by the Governor in his charge to the legislature, pointed out the critical need for improvement. These devastating comparisons dramatized Mississippi's plight at that time:

> Mississippi ranks 45th of 50 states in the amount per capita spent on education.
>
> Mississippi is 49th of 50 states in expenditures per pupil, $600 less per pupil than the national average.
>
> Mississippi's rate of illiteracy at 2.4 percent is twice that of the national average. Louisiana's rate of illiteracy at 2.8 percent is the only state higher.
>
> Mississippi along with Kentucky and West Virginia has the lowest median school years completed. A median of 12.1 years means that just slightly over half the population has completed high school. The national average is 66.6 percent of the population.
>
> Mississippi's average annual salary for instructional staff in public elementary and secondary schools in 1980-81 was $13,017. This is the lowest in the country. The national average was $17,264.
>
> During 1980-81, between 13,000 and 15,000 people dropped out of school. Another 5,000 to 6,000 six-year-olds never started.
>
> Mississippi has the highest reject rate of persons wanting to join the army. Thirty-five percent cannot pass the intelligence

test, compared with 9 percent nationally.[35]

The emphasis of the message was on the economic benefits that would accrue from an improved level of educational achievement. It was estimated, for example, that only 30,000 students had graduated from Mississippi high schools in 1981 from an original 1969 starting class of 54,000. The resultant loss in productive human effort over the lifetime of the class was calculated to be four billion dollars.[36]

With that premise, the recommendations that were included in the Governor's message covered the entire spectrum. The first emphasis was on early childhood education. The testimony was overwhelming from the experience in other states that children who attended preschool programs fared markedly better in school than those who did not. Not only all day kindergarten but a system of teacher aides in the first three grades was recommended in an effort to break the cycle of drop-outs that stemmed from inadequate early teaching efforts.

The evidence in support of these proposals was overwhelming. Using the Lee County School System as a model for the teacher aides program, the report found that first grade students in the system moved in one year from the 23rd percentile, well below the national norm, to the 59th percentile, above the national norm, as a result of the program. For kindergartens the results were even more dramatic.

A second initiative lay in the area of school attendance. The state's historical record in this regard was abysmal. Not only had it been, in 1918, the last state to adopt a compulsory attendance law, but in 1956, under the hysteria that followed the *Brown* decision, it repealed that law. A largely ineffectual attendance statute was enacted in 1977, but there were no penalties for failure to observe it and virtually no resources were made available to encourage its observance. It was urged that an attendance law that placed sanctions on parents or guardians be enacted.

A third significant approach to reform came in the call for greater innovation in teacher preparation, certification and recertification. There was a specific recommendation for conditional certification of new teachers and for a continuing process of performance based evaluation. Professional development programs for both teachers and administrators were advanced, and an institute for the training of principals was suggested. The concept of accountability was placed in the forefront of school policy.

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[35] REPORT TO THE GOVERNOR ON EDUCATION, *vii* (1982).

[36] *Id.*

Under the proposal, the accreditation of schools would be based on compliance with a new and more rigorous set of standards that would include a broadened and more demanding curriculum. The stated objective of the proposed reforms in this area was to establish an accreditation system based on measurable elements related to instructional effectiveness and to provide for state intervention when performance was substandard. The recommendations stopped short of advocating a take-over of a non-performing district by the State Department of Education.

Finally, there was the plea for substantially increased salaries for teachers that would ultimately bring them to the Southeastern average. In any event, it was obvious that additional funding would be required which would involve a major tax increase.

In what has subsequently come to be known as the "Christmas Miracle" of December, 1982, the legislature responded to the call for the massive reforms in an unprecedented way. At no other time in the state's history had there come together so concentrated an effort at revamping the education system. The result was that in two weeks almost all of recommended reforms were enacted into a law that also included provisions for the largest tax increase ever approved in the state.[37]

The passage of the Educational Reform Act[38] presaged a new level of educational priorities for the state. For the first time in the state's history there was put in place a statewide mechanism for the measuring of academic achievement. The performance based system of accreditation has greatly enhanced the capacity of teachers and administrators to appraise the effectiveness of their efforts. The procedures for teacher certification and personnel appraisal have made it possible for the first time to identify and recognize the most productive individuals. Renewed emphasis on proper teacher preparation formed a major part of the program.

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[37] 1982 MISS. LAWS ch. 17 (extraordinary session).

[38] MISS. CODE ANN. §§ 37-1-1 to -11, §§ 37-3-1 to -49 (Supp. 1988).

In addition to the formal results, an important collateral development was the raising of the level of expectations which most citizens had about their schools. Instead of accepting mediocrity and in many cases expecting it, the passage of the Education Reform Act caused a new set of standards to be applied to Mississippi education. This led to a realigning of the political agenda with candidates for governor and the legislature attempting to outdo each other in their expression of support for educational improvement. The 1988 session of the legislature dramatically confirmed that trend by enacting the largest increase in educational appropriations ever passed. A specific result was the raising of the state's teacher salary average from 49th in the country to 34th. Thus, the stated goal of the Education Reform Act to reach the Southeastern average was achieved.

A final result of this activity in school reform has been the recognition even though we have come far from the dreary old days of a generation ago, we still have a long way to go to develop the quality programs that will make the state truly competitive. No longer are we willing to stick our heads in the sand and pretend that all is well.

That brings us then to the ultimate question: Where do we go from here? At the risk of oversimplification, it would appear that there are several obvious tasks. They are, in no certain order of priority, as follows:

1. Establish clear lines of accountability for performance in every school district.
2. Maintain salaries at competitive levels.
3. Consolidate small and noncompetitive schools.
4. Reduce the number of drop-outs from the present level.
5. Concentrate on improving the poorest districts with a program of equity funding.
6. Improve the physical facilities at many schools, including air-conditioning classrooms.
7. Reduce to a simple majority the vote necessary to approve a

school bond issue.
8. Develop early intervention programs to reduce the number of at-risk children.
9. Create more remediation opportunities for marginal students.
10. Provide in-school instruction and other services to reduce the number of teen-age pregnancies.
11. Continue the process of broadening the curriculum.

The attainment of these objectives will depend on many factors, not the least of which is the commitment of additional state and local resources. Just as vital, however, is the continuing public interest in improving the manner in which our schools are administered. Some of the smaller high schools are facing critical decisions, as the requirements for a broader and more demanding curriculum become more binding on them. For example the new accreditation standards now call for 25½ credits, exclusive of vocational education courses.

More schools will utilize the new technologies, relying on computers and videodiscs not only for instructional purposes but for the equalizing of education opportunity. These technologies may well provide the basis for small, rural schools to compete equally with the larger institutions. What is certain is that every conceivable scientific advance must be utilized to deliver the quality of instruction that is necessary for more schools to compete.

The organization and management of school districts must continue to undergo scrutiny. One advance on which most professional administrators have long agreed lies in having county superintendents appointed rather than elected. It must be regarded as a set-back for progressive educational administration that in the recent referendum not a single county voted to make that change. While schools should continue to be answerable to the public, the direct political influence that comes as a result of electing county superintendents cannot be regarded as sound.

State Superintendent Richard Boyd, in his report to the people of Mississippi in November, 1987, pointed out the continuing obstacles that we face in the further reforms necessary to bring our educational system to a nationally competitive status. He quoted Arkansas Governor Bill Clinton, a leader for reform in his state, as having said, "In general, everybody is for change;

in particular, very few are for it."[39] It is now time to make those specific adjustments that, like fine-tuning a sophisticated piece of machinery, determine not only how efficiently it can perform but also how effectively it does the job it was created to do.

One of the major emphases in this process must be increased attention to those in the lower rungs of the social and economic scale. It has been observed by more than one authority that Mississippi has gone a long way in developing a competitive system for the top fifty per cent of its students, but has not achieved that result for the lower fifty per cent.

With all of the challenges in front of us and with all of the deficiencies in our educational system that remain to be addressed, it can be said with assurance that there is now in place in Mississippi a fundamental structure that for the first time in our history is capable of producing competitively educated men and women. The fulfillment of that task remains our continuing obligation.

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[39] BOYD, THE MISSISSIPPI EDUCATION REFORM ACT FIVE YEARS LATER, at 44 (1987).

DESEGREGATION AND EDUCATION*

*Constance Baker Motley***

Perhaps the best remembered school desegregation case which stemmed from the Supreme Court's 1954 decision outlawing segregation in public educational institutions is the case which opened the University of Mississippi to its Afro-American citizens. It is perhaps fair to say, in retrospect, that "Jim Crow," the unofficial name for the infamous separate but equal doctrine, met its death in Mississippi when James Meredith was finally admitted to the University in 1962, although its funeral is still going on. That seems to be why we are here, 35 years after *Brown*, still talking about school desegregation problems.

Long before suit in the *Meredith* case was filed, Mississippi had joined with other southern states after the *Brown* decision in the South's massive resistance campaign. And a few days before the University of Mississippi case was actually filed, the Freedom Riders arrived in Jackson, Mississippi. Such a direct frontal assault on the southern states' policy of racial segregation which the Freedom Riders represented had not occurred previously in this century in the Deep South. Mississippi's reputation in the area of race relations was such that no one believed that Afro-American citizens in Mississippi would ever have the courage to bring suit to open the University of Mississippi, such as had occurred in every other deep South state by 1961 except

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* This paper represents the introductory remarks presented at "The Civil Rights Movement and the Law — A National Symposium" at the University of Mississippi on April 1, 1989.

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South Carolina. This confluence of the Freedom Riders and the lawsuit to open the University produced a race relations climate in Mississippi that surely must have rivaled the climate in Mississippi prior to the firing on Fort Sumter. Although all the Freedom Riders were non-violent and their mission clearly defined, they were treated as anticipated by the state officials in Mississippi: all were arrested and jailed, high bail was set in each case. Consequently, nobody was surprised that federal force was ultimately required to secure the admission of a single Afro-American student to the University of Mississippi. Mississippi was regarded in early 1960, and prior thereto going back to the end of Reconstruction, as the most racist state because of its treatment of its Afro-American citizens and because of the utterings of some of its more notorious political figures such as Senator Bilbo, who was in the United States Senate for many years as the leading advocate of racial segregation and discrimination. Mississippi was one of the two states in the Union (South Carolina was the other) in which former slaves controlled state government during Reconstruction and in which Afro-Americans constituted a majority of the population after the Civil War. Mississippi had also been left behind in the industrialization process which swept the nation after the Civil War. A largely agricultural society, Mississippi's social and political climate stagnated. It was, therefore, one of the states in which restrictions on the newly freed slaves were the most severe after whites regained control of state government.

When James Meredith's year and a half legal battle came to an end in 1962, the Governor of the state issued a call to all state officials to resist the United States Government's enforcement of the *Brown* decision. This open rebellion against the United States, of course, ultimately led to the sending of federal troops to enforce the Supreme Court's decision. Aside from the question of equal protection for Afro-Americans in the state of Mississippi, the *Meredith* case represented one of the few times since the Civil War that a southern state renounced the authority of the United States. Prior to the *Meredith* case, there was only one other instance in which federal troops were actually required to enforce the Supreme Court's decision, and that was the case of Little Rock, Arkansas, where Governor Faubus' failure to uphold and enforce the law as required by his oath of office caused a reluctant President Eisenhower to send in federal troops. Again, in retrospect, Eisenhower's decision to send in federal force in the *Little Rock* case saved the *Brown* decision from an ignominious death and made it clear that the national government would send troops to enforce the constitutional rights of Afro-Americans when necessary. Notwithstanding this unequivocal statement of the President's constitutional duty to enforce Supreme Court decisions, Mississippi, through its governor, decided to resist a Supreme Court order. With that decision, we Americans had a constitutional crisis on our hands.

The thing to emphasize in retrospect is that the civil rights movement of the 1950s and 1960s stood on firm federal constitutional ground, which had become a part of the national constitution in the last century, as a result of the movement to abolish slavery and include Afro-Americans in the body politic. In short, the Reconstruction Amendments added a new ideal to those stated in the Constitution. What those amendments did, in effect, was to inculcate in the Constitution the ideal of equality which was set forth in the Declaration of Independence but not the original Constitution or the Bill of Rights. The Declaration of Independence had established the ideological framework for our society, but the framers' ambivalence about slavery and free persons of color had obviously caused a failure to proclaim the equality of all persons as one of our society's basic tenets in the Preamble to the Constitution and/or in the Constitution itself.

One result of the litigation strategy of the civil rights movement of the 1950s and 1960s was to bring the Supreme Court and lower federal courts to center stage in the American community for the first time in this century. The American people, a hundred years removed from the Civil War and about a hundred and fifty years removed from the adoption of the Constitution, were only dimly familiar with the role of the federal judiciary under our Constitution. How the Supreme Court's decisions would be enforced during a constitutional crisis when a state government refused to honor federal authority was also something with which the American people were not well acquainted. *Little Rock* and the *Meredith* case schooled me and my generation of Americans in how the federal government works during a constitutional crisis of the kind created by state resistance to federal authority. We also now know how wise the framers' of the Constitution were in making federal judges lifetime appointees free from political pressures. Having had these lessons, our present constitutional framework should see us through the twenty-first century.

There are those who argue that the *Brown* decision was a failure because it did not seat every Afro-American child next to a white child in public schools or lift all of the descendants of former slaves out of the poverty status in which most of them were in 1954. But, of course, the *Brown* decision was not intended to change the economic status of blacks overnight or to create a kind of black and white checkerboard in the public school system of every major city. As Thurgood Marshall argued in the Supreme Court, a decision outlawing segregation in public education was necessary so that the process of public school desegregation in this nation could commence. And that is exactly what happened. *Brown* was simply the beginning of a new day. Equal educational opportunities were perceived in 1954 to be the key to our salvation as persons of color. Without a clear Supreme Court statement that racial segregation in public education violated the equal protection clause of the fourteenth amendment to the Constitution, it was argued, the process of bringing Afro-Americans into the mainstream of American life could not begin, particularly in the Deep South where school segregation was decreed by state law or state policy. The *Brown* case was also designed to change national constitutional policy with respect to education. In 1954, the *Brown* case was in line with the historic national policy change represented by President Truman's abolition of segregation in the armed forces in 1948. Segregation in the armed forces during World War II had embarrassed the nation. It had been notice to the whole world that notwithstanding the fourteenth amendment, this was a racist country.

Thirty-five years after *Brown*, and 40 years after the presidential determination to end segregation in the armed forces, we can now see that a significant change has taken place in the nation as a whole with respect to the status of Afro-Americans. We are no longer a racist country as a matter of express national policy or constitutional law. The *Brown* decision was followed in rapid succession by a series of Supreme Court decisions striking down segregation in all other areas of the public life of the American community. In 1989, many black Americans now live in a totally integrated community from cradle to the grave.

School desegregation will continue to be an issue in our society for the foreseeable future, but apparently without the attention on the national level that it once commanded. School segregation is no longer perceived to be the single most important issue in the black community that it once was simply because the Supreme Court has spoken on the pivotal issue, the Supreme Court's decision has been enforced with the use of federal troops where necessary, and there simply is no real present threat that the *Brown* decision will be reversed by the Supreme Court. How we change the fortunes of those at the bottom of the social and economic ladder in the nation is now at center stage. And, of course, the question involves consideration of the educational opportunities available to those on the first rung of the ladder to first class citizenship. In those American cities where poor blacks are concentrated in the older centers, de facto segregation prevails complicated by poor quality education stemming from the political powerlessness of those involved. Black political empowerment in the major cities and states seems to be a partial answer to how we rid our major cities of ghetto blight. The remainder of the answer may depend on federal financial support. The fact that such school segregation is not amenable to traditional remedies does not mean that the problem should be abandoned. It simply means that thoughtful new approaches must be developed.

There is a tendency on the part of public interest groups today, particularly activists on behalf of the poor, to turn to the courts for the solution of controversial issues which legislative bodies have avoided as in the case of school segregation. Many of these cases have not met with the legal success which civil rights lawyers initially found in resorting to the courts. In my view, the reason for this relative lack of legal success is that there is not such a clear constitutional and legislative basis for their pleas as there was in the case of school desegregation. In the case of the homeless, for example, there are those who advocate that there is some right to be found in the Federal Constitution to be adequately housed. Some state courts have already found such a right in their state constitutions. It is presently difficult to conclude that a claim such as the right to adequate housing can succeed in the courts without a clear constitutional or congressional legislative basis, especially since such a claim has not seriously been made in the first two hundred years of our constitutional history. The homeless condition of so many of our people cries out for solution. The most obvious solution is to be found in a program of federal financial assistance to housing programs where required. Many cities and states will try to solve the problem locally. But to find a right in the Constitution to compel a federal financing solution will be difficult indeed. The ideal of adequate housing for all is akin to the ideal of free public school education for all which developed in the last century and which finally found universal support at both the state and national level.

The legacy of *Brown*, therefore, may well be a realization that the time has come once again to return to the political process to garner support for new societal ideals. We may well need an amendment to the Federal Constitution which will force Congress to appropriate the money to provide a right to basic human needs such as shelter, food, health care, quality public school education and education beyond the public school level. Some states may soon amend their state constitutions to so provide in response to the will of their people. Amendments to the Federal Constitution, of course, must be preceded by a two-thirds majority consensus that each of us would be entitled as members of the American community to these basic needs. The problem of the homeless, which is tugging at the heart strings and purse strings of all of us, may well be the problem around which such a consensus will develop as it did in the last century around the issue of human slavery and free public school education. Governments are created to serve the needs of society. We are the first society to unabashedly proclaim the dignity of the individual and to declare each of us a child of God as we did in our Declaration of Independence.

SEEKING EDUCATIONAL FUNDING EQUITY IN MISSISSIPPI: "I ASKED FOR WATER, YOU GAVE ME GASOLINE"*

*T.H. Freeland, III, T.H. Freeland, IV and Tim F. Wilson***

I. INTRODUCTION

The mechanics of school finance and administration — a combination of local, state, and federal funding and governance — has been a matter of public concern since the founding of the federal government. Among the earliest legislation by Congress was the sixteenth section lands grant which provided aid to schools in newly opened western lands.[1] Following immediately upon this grant of aid for schools were complaints about the equity of the aid being given.[2]

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* *See* Tommy Johnson, *Cool Drink of Water Blues* (1929)("I asked for water, she gave me gasoline."); *accord* Chester Burnett a/k/a Howlin' Wolf, MOANING' IN THE MOONLIGHT (1956).

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[1] The first proposals for disposing of lands west of the original thirteen states also included proposals that one-tenth of the land be set aside for various purposes, including education. *See* B. HIBBARD, A HISTORY OF PUBLIC LANDS 38 (1924)(discussing 1785 proposal for land disposal with school lands grant). These proposals led in turn to a proposal that the center section of each township—the sixteenth section—be set aside for the support of the schools, a proposal incorporated into the first sixteenth section land grant in the Northwest Land Ordinance of 1785. G. KNIGHT, HISTORY AND MANAGEMENT OF LAND GRANTS FOR EDUCATION IN THE NORTHWEST TERRITORY 13 (1 Papers of the American Historical Association No. 3, 1885); *see* XXVIII JOURNALS OF THE CONTINENTAL CONGRESS 298, 301 (1933)(1785 land ordinance, reserving central section of each township "for the maintenance of the public schools").

[2] In Mississippi, for instance, the federal government began to grant lieu lands as a substitute for sixteenth sections sold in the Chickasaw Cession area after 1836. By 1839, the Mississippi legislature informed Congress that the lieu lands were "wholly worthless and utterly inadequate to the purpose [of supporting schools]." Memorial of February 6, 1839, ch. 62, 1839 Miss. Laws 99, 100. Just as varying local wealth produces disparities in the modern property tax system, varying quality of sixteenth sections produced disparities in the school land grant system.

Issues concerning funding equity arose naturally from the favored method for financing schools: local property taxes. While questions of funding equity arise in several contexts — across racial[3] or other demographic boundaries,[4] or about kinds of education (vocational versus college preparatory, for instance) — an issue of particular recent interest has been geography and funding equity, an issue involving how local funding of education produces disparities between districts. This issue has recurred in the Mississippi legislature throughout the twentieth century. Each time the issue has arisen, the legislature has taken steps that, even at the time, provided only partial solutions.[5] Most recently, in the 1989 term, the Mississippi Legislature passed a "Uniform Millage Assistance Grant" designed to supplement district school funds to the extent those district funds cannot produce the state-wide average in property tax revenues.[6] This article examines the history of the legislature's efforts to deal with equitable funding, as well as potential challenges to inequities in funding.

One element of the funding equity debate has been a question of what should be compared between various districts to decide whether a system is equitable. The focus of this article is on equality of educational opportunity, and not on educational outcomes.[7] The debate over whether education can be an equalizing force in society at large is not relevant to the debate over whether opportunity within the education system itself should be equalized.[8]

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[3] *See* Ayers v. Allain, 674 F. Supp. 1523, 1563-64 (N.D. Miss. 1987)(unsuccessful challenge to funding disparities between Mississippi's predominantly black institutions of higher learning and state's predominantly white institutions).

[4] *See* Kadrmas v. Dickinson Public Schools, 108 S. Ct. 2481, 2484 (1988)(indigent's unsuccessful challenge to fee for bus transportation); Plyler v. Doe, 457 U.S. 202, 230 (1982)(illegal alien's successful challenge to bar free public education for illegal aliens).

[5] *See infra* at text accompanying notes 92-115.

[6] S. 2254, 1989 Miss. Reg. Sess.; *see infra* text accompanying notes 136-147.

[7] There has been a vigorous debate over the effect of educational opportunity on educational outcome, beginning with the Coleman Report, J. COLEMAN, E. CAMPBELL, C. HOBSON, J. MCPARTLAND, A. MOOD, F. WAINFELD & R. YORK, Equality of Educational Opportunity (1966) [hereinafter COLEMAN REPORT]. *See* Hodgson, *Do Schools Make A Difference*, in THE "INEQUALITY" CONTROVERSY: SCHOOLING AND DISTRIBUTIVE JUSTICE 22-44 (1977)(discussing course of this debate). The COLEMAN REPORT, a nation-wide study comparing standardized test results to school facilities, concluded that the "product" of a school system does not vary much with the amount of money spent on the schools. COLEMAN REPORT at 21-22, 322-325. The COLEMAN REPORT has been used by those arguing against claims for funding equity. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 42-43 (1973)(citing COLEMAN REPORT and stating that relation of qual-

The funds available relate directly to educational quality or opportunity. The money spent on schools has a direct effect on the kind of school available. The funds available dictate the number of books in libraries, the qualification of teachers, the student-teacher ratios, and the availability of equipment such as language labs or computers. In this sense, the amount available per pupil necessarily effects the quality of education available for each pupil.[9] In their work on funding equity, Coons, Clune, and Sugarman make a compelling argument for the relation of cost to quality. They focus on the fact that the educational services available are determined by the funds available.[10] They state:

> Legislators have assumed, the courts have assumed, society has assumed that spending for education in fact purchases some effect worth having and that more spending will purchase more of that effect. Historically, educators, with near unanimity, have asserted a powerful cost-quality relation in education. [A] leader in this field . . . [has] suggested that the cost-quality relation may even be an accelerating one — that the last dollar spent in the district of highest expenditure may be the most productive of all expenditures.[11]

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ity to cost is one of "major sources of controversy" in debates about educational funding); Moynihan, *Equalizing Education: In Whose Benefit?* in THE "INEQUALITY" CONTROVERSY: SCHOOLING AND DISTRIBUTIVE JUSTICE 98-120 (1977)(arguing that COLEMAN REPORT's conclusions weigh against court-ordered equalization of funding).

[8] The fact, if true, that denials of equal educational opportunity do not effect the "product" of an educational system should not of itself undercut an equal protection claim. There is demonstrable injury — discriminatory distribution of government services — regardless of whether the injury affects an outcome such as test scores. The Supreme Court has properly refused to require that, beyond a showing of actual disparities in educational opportunities, there must be a showing of some effect on educational outcomes. *See* Papasan v. Allain, 478 U.S. 265, 288 n.17 (1986)(refusal to find that disparity was harmless).

[9] J. COONS, W. CLUNE AND S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION 25 (1970).

[10] *Id.* at 25-33. The equalization proposals of this work are discussed in detail, *infra* at text accompanying notes 72-89.

[11] *Id.* at 27 (citing Mort, *Cost-Quality Relationship in Education*, in PROBLEMS AND ISSUES IN SCHOOL FINANCE 9-10 (1952)).

Following Coons, Clune, and Sugarman, this article discusses "equity" in the same way a school administrator would—in terms of the funds available per student. Part I of this article examines the Supreme Court's equal protection jurisprudence in the area of education with particular focus on the degree to which the federal right to education can be used to achieve equal educational opportunities. Part II examines state constitutional provisions related to education, with particular regard to the Mississippi Constitution and the possibility that education may be a fundamental right under state law. Part III examines the structure of school finance used in Mississippi, its origins, and current efforts to reform school finance.

II. FEDERAL EQUAL PROTECTION AND EDUCATION

A central element of the Supreme Court's opinion in *Brown v. Board of Education*[12] was the important role of education in our system:

> [E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[13]

A perennial issue has been whether this language has equal protection consequences outside the desegregation cases. Does this language indicate that education has favored status under the equal protection clause?[14]

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[12] 347 U.S. 483 (1954).

[13] *Id.* at 493.

[14] In equal protection cases concerning education, this language has been consistently quoted in opinions either striking down state restrictions on education or arguing for favored status for education. Kadrmas v. Dickinson Public Schools, 108 S. Ct. 2481,

It is well established that in order to warrant "heightened" review an equal protection challenge either must be premised upon a "fundamental right" or pertain to a "suspect class".[15] The Supreme Court held, in *San Antonio Independent School District v. Rodriguez*[16], that education was not such a "fundamental right" and that educational funding questions did not — without more — involve any "suspect class".[17] The Court, therefore, held that rational basis review was the appropriate standard to apply in education cases. However, the Court appeared to qualify this rejection of heightened review for education in *Plyler v. Doe*[18] in stating that "[S]ome degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence."[19]

In express contradistinction to *Rodriguez*,[20] this holding in *Plyler* gave credence to the notion that, even though education was not itself a "fundamental right," education did influence and directly involve fundamental rights such as freedom of speech and freedom to engage in political activity.[21] The implication resulting from *Plyler* that education might be entitled to some sort of "heightened" scrutiny has been subsequently rejected by the Supreme Court. In *Kadrmas v. Dickinson Public*

2493 (1988)(Marshall, J., dissenting)(quoting *Brown* in arguing for favored status of education); Plyler v. Doe, 457 U.S. 202, 222-23 (1982)(striking down Texas statute which withheld state aid to educate illegal alien children); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 29-30 (1973) (quoting *Brown* in noting importance of education); *Rodriguez*, 411 U.S. at 111 (Marshall, J., dissenting) (quoting *Brown* in arguing for favored status of education); *cf.* Papasan v. Allain, 478 U.S. 265, 284-86 (1986)(remanding for review of disparity in state scheme for distributing school lands income).

[15] *See generally* Comment, *Rational Basis Review Under the Equal Protection Clause — A Double Standard Review —* City of Cleburne, Texas v. Cleburne Living Center, 55 Miss. L.J. 329, 330-337 (1985)(overview of standards of review).

[16] 411 U.S. 1 (1973).

[17] *Id.* at 33-36.

[18] 457 U.S. 202 (1982).

[19] *Id.* at 221 (quoting Wisconsin v. Yoder, 406 U.S. 205, 221 (1972)).

[20] *Rodriguez*, 411 U.S. at 36 (rejecting notion that constitution guarantees "effective" speech or "informed" exercise of franchise).

[21] *Plyler*, 457 U.S. at 221. The Plyler opinion expressly denied that the "heightened" scrutiny employed was because alien school children were involved. *Id.* at 219 n.19. This denial raised expectations that education might be entitled to some form of "heightened" review.

Schools,[22] the Court distinguished *Plyler* from other education contexts by holding that *Plyler* presented "unique circumstances."[23] At least since *Kadrmas*, it seems clear that equal protection cases involving education receive rational basis review.

Equal protection analysis — no matter what the level of scrutiny — requires the Court to analyze thoroughly each facet of the challenged governmental conduct and to consider how such conduct affects the offended citizens. The approach is to require complete articulation of the discrimination and its effects. The thoroughness of the Court's description of the facts relating to the discrimination does not vary with the level of scrutiny (strict/intermediate/low). Rather, differences in the levels of scrutiny determine only how far behind a government's justification for the discrimination the Court will inquire.[24] Low scrutiny will not relieve the Court of the duty to assemble a cogent picture of the discrimination.[25]

Rational basis review is the least stringent form of equal protection analysis. It has been suggested, however, that for some kinds of interests, the Court will require a more rigorous analysis under rational review. This suggestion is based upon recent decisions of the Supreme Court which illustrate that even under rational basis reveiw (low scrutiny) the Court's review of equal protection cases will not always be "toothless."[26] When the Court's analysis has "teeth," it is unlike the situation where "purely economic" regulations are at stake and review is so deferential that even specious hypothetical rational bases may be accepted.[27] In the context of educational deprivations, the Supreme Court appears willing to subject proffered "legitimate purposes" to logical analysis.

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[22] 108 S. Ct. 2481 (1988).

[23] *Id.* at 2487-88 (limiting Plyler to its facts for "heightened" review purposes).

[24] *See* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 435-39, 447-50 (1985)(scrutiny focuses upon proposed "purpose" to be served); Williams v. Vermont, 472 U.S. 11, 22-23 (1985)(same); Zobel v. Williams, 457 U.S. 55, 61-65 (1982)(same).

[25] In Papasan v. Allain, 756 F.2d 1087 (1985), the Fifth Circuit inaccurately assumed that there was, in fact, a uniform state-wide system pertaining to revenues from sixteenth section lands, when there was a bifurcated system dividing the counties in Mississippi into (1) those possessing sixteenth section land (receiving consequent revenues), and (2) those counties without sixteenth section land (receiving no revenues). An initial observation by the Supreme Court was, "To begin with, we disagree with the Court of Appeal's apparent understanding of the crux of the petitioners' claim." Papasan v. Allain, 478 U.S. 265, 286 (1986). The assumption that Mississippi's school lands trust system was facially neutral and that funding differences were accidental was simply factually incorrect. This factual disagreement between the Fifth Circuit and the Supreme Court, as to just what the discrimination challenged consisted of, was a keystone to the Supreme Court's opinion. It would appear, therefore, that at least in the context of educational opportunity the Supreme Court will not allow the lower courts to ride roughshod over the factual circumstances of a challenged discrimination.

At least some of the confusion over how rational basis review works in education cases is not the result of "levels of scrutiny" or how the "legitimacy" of a discrimination is supported. Rather, sometimes apparently incompatible opinions are the result of fundamental disagreements within the Court as to what the — ill-defined and non-fundamental — federal right to education embodies. Beginning with *Rodriguez*, the opinions on all sides of this issue have each turned on the writer's implicit assumptions about the content of the right to education, and not on the choice of a level of scrutiny. In *Kadrmas*, Justice O'Connor, for the majority, assumes that it is legitimate to charge a fee for school bus transportation. Proceeding from this assumption, it is her view that she need only rationalize the discriminatory application of the fee solely to "unreorganized" districts:

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[26] *See* Comment, *supra* note 15, at 345-46, 356 (discussing "teeth" in rational basis analysis); *see, e.g., Papasan*, 478 U.S. at 286-92 (nondeferential review finding discrimination in school funding); *City of Cleburne*, 473 U.S. at 447-50 (nondeferential review finding discrimination against the mentally retarded); Hooper v. Bernadillo County Assessor, 472 U.S. 612, 616-23 (1985)(nondeferential review finding discrimination concerning veteran's tax preference); *Williams*, 472 U.S. at 22-27 (nondeferential review finding discrimination in automobile tax credit plan); *Zobel*, 457 U.S. at 61-65 (nondeferential review finding discrimination in tax rebate system); *cf.* New York State Club Ass'n v. City of New York, 108 S. Ct. 2225, 2235-37 (1988)(detailed analysis used to uphold nondiscrimination law from facial invalidity); Banker's Life & Casualty Co. v. Crenshaw, 108 S. Ct. 1645, 1653-54 (1988)(detailed analysis used to uphold facially discriminatory appeal penalty); Lyng v. International Union, 108 S. Ct. 1184, 1192-94 (1988)(detailed analysis used to uphold facially discriminatory denial of food stamps to strikers); Pennell v. City of San Jose, 108 S. Ct. 849, 857-59 (1988)(detailed analysis used to uphold rent control ordinance).

[27] *See, e.g.*, City of New Orleans v. Dukes, 427 U.S. 297, 303-06 (1976)(upholding ordinance on hypothesis that eight-year veterans of pushcart hotdog market will operate more in French Quarter tradition than less-experienced pushcart operators); Williamson v. Lee Optical, 348 U.S 483, 489-91 (1954)(upholding ordinance on hypothesis that "a needless, wasteful requirement"—of prescription by ophthalmologists before optician could replace eyeglasses—served public welfare).

> The legislature could conceivably have believed that such a policy would serve a legitimate purpose of fulfilling the reasonable expectations of those residing in districts with free busing arrangements imposed by reorganization plans. Because this purpose could have no application to nonreorganized districts, the legislature could just as rationally conclude that those districts should have the option of imposing user fees on those who take advantage of the service they are offered.[28]

The dissent by Justice Marshall, joined by Justice Brennan, proceeds essentially from the premise that "to burden the access of poor persons to an education" in and of itself violates equal protection; in other words, the bus fee itself is unacceptable.[29] Therefore, no analysis of the legitimacy of discriminating between reorganized and unreorganized districts enters into the issue.[30] Justice O'Connor, like the North Dakota Supreme Court, assumes that "transportation is not a necessary element of the educational process."[31] This is an assumption about the content of the federal right to education. This assumption, not methods of rational basis analysis, decided the case.

There is a similar difference of fundamental orientation toward the content of the federal right to education evident in *Papasan v. Allain*[32]. Justice White's majority opinion in *Papasan* assumes that *Rodriguez* means that disparities under a facially-neutral system oriented toward local control of local schools is permissible, whereas, a bifurcated system which knowingly and arbitrarily treats one group of schoolchildren differently than another is not permissible.[33] Justice Powell, in his dissent, exhibits an entirely different understanding of the meaning of *Rodriguez*. To Justice Powell, *Rodriguez* stands for the proposition that unless funding disparities in the educational context are pronounced, no discrimination of constitutional proportion will be found.[34]

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[28] *Kadrmas*, 108 S. Ct. at 2491.

[29] *Id.* at 2491-94.

[30] *See id.* The dissent by Justice Stevens, joined by Justice Blackmun, makes no assumption as to whether school bus fees are permissible barriers to education, but rather demonstrates that the purported legitimate purpose of the legislature in discriminatorily imposing such fees is in its own terms self-contradictory—thus not rational and not legitimate. This dissent essentially accuses the majority opinion of lacking "teeth". *Id.* at 2494-95.

[31] Kadrmas v. Dickinson Public Schools, 402 N.W.2d 897, 901 (N.D. 1987). The North Dakota Supreme Court at least concedes, "No one could seriously dispute the logic of the assertion that a child must reach the schoolhouse door was a prerequisite to receiving the educational opportunity offered to them." *Id.*

[32] 478 U.S. 265 (1986).

The opinions in *Papasan* and *Kadrmas* illustrate that, depending upon what assumptions are made and upon how the issue is framed, the result of rational basis analysis can differ substantially. These cases demonstrate that before a rational basis analysis is even begun, the tacit assumptions about the content of the ill-defined federal right to education will have defined the issue so that the result achieved is preordained. Therefore, it is perhaps more useful, for predicting the result of educational equal protection claims, to focus upon what the claim presupposes about the content of the ill-defined federal right to education, rather than to focus upon the mechanics of rational basis analysis. Whether the level of review is "heightened", "with teeth", or "deferential" would appear to have far less effect on the outcome of a claim than does the question of how the claim is assumed to be included in, or exclusive of, the federal right to education.

III. The State Constitutions and Education

Given the ill-defined and non-fundamental character of the federal right to education, an alternative basis for educational claims may be state constitutional provisions. Use of such sources has been tried with varying success. In *Serrano v. Priest*,[35] for instance, the California Supreme Court struck down California's school finance scheme.[36] While the case was pending on remand, the United States Supreme Court decided *Rodriguez*, apparently overturning *Serrano*. However, on appeal after remand, the California Supreme Court grounded its grant of relief in the state constitution, and once again overturned the state's financing scheme.[37]

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[33] *Papasan*, 478 U.S. at 286-89.

[34] *Id.* at 296, 300-01 (because sixteenth section school lands income amounted to only one and one-half percent of overall school funding disparity was *de minimis*).

[35] 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971)("Serrano I").

[36] *Id.* at 589, 487 P.2d at 1244, 96 Cal. Rptr. at 604.

Beyond avoiding the mandate of *Rodriguez*, there is one other advantage to basing such a claim on state constitutional grounds. Typically, state constitutions have specific provisions concerning education. Mississippi is typical in this sense, although Mississippi's education provisions acquired some unusual language in the 1950s and 1960s.[38]

Evaluation of claims based on provisions in state constitutions requires examination both of the appropriate standard for evaluating claims of unconstitutionality, and of the specific guarantees, if any, concerning education. While the Mississippi Constitution has no equal protection clause, the Mississippi Supreme Court has repeatedly used equal protection analysis in reviewing statutes under the state's due process clause. The court has stated that the test for whether a statute involving economic regulation violates the due process clause of the state constitution is whether the statute "has no reasonable relation to any proper government purpose."[39]

Mississippi is not alone in following a rule that the guarantee of due process carries with it an equal protection-like guarantee. At the same time as *Brown*, the Supreme Court held that segregation also violated fifth amendment due process.[40] Since then, the Supreme Court has held that a single method of analysis is to be performed for fifth amendment due process and fourteenth amendment equal protection.[41]

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[37] Serrano v. Priest, 18 Cal. 3d 728, 775-76, 557 P.2d 929, 957-58, 135 Cal. Rptr. 345, 373-74, *cert. denied*, 432 U.S. 907 (1977)("Serrano II").

[38] *See infra* notes 52-53 and accompanying text.

[39] Craig v. North Miss. Community Hosp., 206 Miss. 11, 39, 39 So. 2d 523, 528 (1949) (quoting Albritton v. City of Winona, 181 Miss. 75, 97, 178 So. 799, 804 (1938)). The state due process clause is MISS. CONST. art. 3 § 4.

[40] Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

[41] Shapiro v. Thompson, 394 U.S. 618, 641-42 (1969); *see* Weinberger v. Wiesenfeld, 420 U.S. 636 n.2 (1975) ("This Court's approach to Fifth Amendment equal protection has always been precisely the same as to equal protection claims under the Fourteenth Amendment."). Thus, rational basis review is identical under either amendment. *Compare* Dandridge v. Williams, 397 U.S. 471, 483-86 (1970)(fourteenth amendment rational basis review applied in upholding state welfare benefits scheme) *with* Richardson v. Belcher, 404 U.S. 78, 78-84 (1971)(fifth amendment rational basis review applied in upholding federal welfare benefits scheme).

Due process analysis of economic regulation under the Mississippi Constitution mirrors traditional rational basis review, examining whether a statute has a reasonable relation to a government purpose.[42] In *Albritton v. City of Winona*,[43] the Mississippi Supreme Court stated that courts have "expanded [due process] beyond its literal meaning of 'due procedure' and brought within it substantive as well as procedural rights."[44] In only one case has the Mississippi Supreme Court overturned a statute following this analysis, holding a statute governing insurance agents unconstitutional in *Saucier v. Life & Casualty Co.*[45] The court held that this statute "has no relation to the end or object for the accomplishment of which this statute was enacted, or to any other imaginable legitimate legislative end."[46] The court specifically referred to the due process provisions of both the federal and state constitutions in making this ruling.[47]

The due process/equal protection analysis followed by the Mississippi Supreme Court might provide a strong line of attack if education had the status of a constitutional right under Mississippi's constitution. If education presents a fundamental right or interest, then statutes conferring unequal benefits might well be subject to greater scrutiny than ordinary educational benefits.[48] State-law based challenges since *Rodriguez* have usually failed because the state court refused to hold education a fundamental right.[49] The Mississippi Supreme Court, in *Clinton Municipal Separate School District v. Byrd*,[50] recognized a fundamental right to a minimally adequate education. Recognizing that there may be no such federally-created right, the court held that such a right was fundamental under Mississippi law, regardless of its status under the federal constitution.[51] *Byrd* looks to statutory provisions for its finding of a fundamental right.

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[42] *See* Mississippi State Tax Comm'n v. Flora Drug Co., 167 Miss. 1, 19, 148 So. 373, 376 (1933).

[43] 181 Miss. 75, 178 So. 799, *appeal dismissed*, 303 U.S. 627 (1938).

[44] *Id.* at 96-97, 178 So. at 802-03 (citing *Flora Drug Co.*). *Albritton* and *Flora Drug* both involved challenges based on federal and state due process. *Albritton*, 181 Miss. at 92, 178 So. at 801; *Flora Drug Co.*, 167 Miss. at 15-17, 148 So. at 375. Both use the same test. *Albritton*, 181 Miss. at 95, 178 So. at 804; *Flora Drug Co.*, 167 Miss. at 19, 148 So. at 376. Both involve a mixture of federal and state cases. *Albritton*, 181 Miss. at 95-97, 178 So. at 803-04; *Flora Drug Co.*, 167 Miss. at 23-29, 148 So. at 377-79.

[45] 189 Miss. 693, 198 So. 625 (1940). The legislature had passed a statute that, in effect, converted special agents of insurance companies into general agents, binding the companies as to any changes in coverage the agents made, regardless of the terms of the policies or the limits on the agents' authority placed by the company. *Id.* at 699-700, 198 So. at 627. In holding this statute unconstitutional, the court, noting that the purpose of the statute was to supervise insurance companies and their agents, held that the act could not rationally serve such a purpose. *Id.* at 705, 198 So. at 625.

[46] *Id.*

[47] *Id.*

[48] For cases using fundamental rights analysis to overturn state finance schemes, see *infra* note 56. For cases refusing to find education a fundamental right, see *infra* note 49.

The Mississippi Constitution itself also indicates the importance of education. The Mississippi Constitution of 1890 had im-

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A few state courts have refused to view this question in terms of fundamental rights, with varying results. In Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, 282, *cert. denied*, 414 U.S. 976 (1973), the New Jersey Supreme Court refused to find education to be a fundamental right because the court viewed the question of fundamental rights to be unhelpful in equal protection analysis. The court proposed an equal protection analysis that involved weighing the nature of the restraint involved against the apparent public justification. *Id.* at 282. However, because of the implications for other local government services, the court did not decide the case on equal protection grounds. *Id.* at 283-87. Ultimately, the court struck down the state's school finance scheme under the state constitutional requirement of a "thorough and efficient system of free public schools." *Id.* Following *Robinson* in its criticism of fundamental rights analysis, courts in Idaho and Oregon have upheld state financing schemes. Thompson v. Engelking, 96 Idaho 793, 537 P.2d 635, 645 (1975)(using rational basis review to uphold scheme); Olsen v. State, 276 Or. 9, 554 P.2d 139, 144-145 (1976)(using *Robinson* weighing test to uphold scheme). In Dupree v. Alma School District No. 30, 279 Ark. 340, 651 S.W.2d 90, 90-95 (1983), the Arkansas Supreme Court applied rational basis review in striking down Arkansas' school finance scheme without reaching the question of whether education involves a fundamental right.

[49] Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1017 (Colo. 1982)(challenge to state finance scheme, based on state equal protection, rejected because education is not fundamental right); McDaniel v. Thomas, 248 Ga. 632, 285 S.E.2d 156, 167 (1981)(same); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 768 (Md. Ct. App. 1983)(same); East Jackson Public Schools v. Michigan, 133 Mich. App. 132, 348 N.W.2d 303, 305 (1984)(same); Board of Educ. v. Walter, 58 Ohio St. 2d 368, 390 N.E.2d 813, 819 (1979)(same); Fair School Fin. Council of Okla., Inc. v. Oklahoma, 746 P.2d 1135, 1147 (Okl. 1987)(same); Board of Educ. v. Nyquist, 57 N.Y.2d 27, 439 N.E.2d 359, 366 (1982)(same). At least two states do not fit this pattern. In Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590, 592-593 (1973), the court found education a fundamental right under the state constitution, yet rejected the plaintiffs' claims, finding that the education scheme still had to meet only rational basis review. In Buse v. Smith, 74 Wis.2d 550, 247 N.W.2d 141, 149 (1976), the court found that there was a fundamental right to an equal education, but held that the state constitution did not mandate "absolute uniformity," and, therefore, rejected the challenge to the school finance scheme.

[50] 477 So. 2d 237, 240 (Miss. 1985).

[51] *Id.* (distinguishing *Rodriguez*); *see* Warren County Bd. of Educ. v. Wilkinson, 500 So. 2d 455, 459 (Miss. 1986)(following *Byrd*).

posed upon the legislature a "duty . . . to encourage by all suitable means, the promotion of intellectual, scientific, moral and agricultural improvement, by establishing a uniform system of free public schools . . . for all children between the ages of five and twenty-one years . . . ."[52] The provision has been weakened somewhat; language making the provision discretionary was added in 1960, when Mississippi was attempting to avoid school desegregation.[53] The provision has been seen as requiring the legislature to provide access to a school for each child.[54] Even in weakened form, this provision has been seen as granting a right to an education.[55]

The conclusion that education involves a fundamental right has been an essential first step in several state cases striking down educational financing schemes.[56] Construing language similar to that in the Mississippi Constitution, courts in California,[57] Connecticut,[58] West Virginia,[59] and Wyoming[60] have held that education involved fundamental rights. In California[61] and Connecticut,[62] this holding led to an application of strict scrutiny and the striking down of the state's financing scheme. In West Virginia[63] and Wyoming[64] the holding led to a requirement of a compelling state interest to justify the classification. Since it is generally acknowledged that the test under "strict scrutiny" is whether a "compelling state interest" is served, it would appear that the strength of the right to education in the foregoing states is equivalent.[65]

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[52] Miss. Const. art. 8, § 201 (1890, amended 1960). This provision originated in the 1869 constitution and the reconstruction era emphasis on establishing a state system of education. *See* Miss. Const. of 1869, art. VIII, § 1 (requiring legislature to establish system of free public schools).

[53] Miss. Const. art. 8, § 201. The 1960 amendment was designed to assure the legislature of a free hand in fighting the mandate of *Brown*, a matter much in the mind of the legislature at the time. *See* Act of April 27, 1960, ch. 316, §§ 1, 9, 1960 Miss. Laws 462, 462, 467 (allowing local boards to close schools and transfer students out of districts in order to maintain "public peace, order or tranquility").

[54] Myers v. Board of Supervisors, 156 Miss. 251, 262, 122 So. 718, 721 (1929).

[55] In Jackson v. Franklin County School Board, 806 F.2d 623, 630 n.11 (5th Cir. 1986), a case under the Education of Handicapped Children Act, the court stated that the child involved had a "right" to an education, citing, in part, Miss. Const. art. 8, § 201 and Miss. Code Ann. § 37-13-1 (1972).

[56] *See* Serrano v. Priest, 18 Cal. 3d 728, 765-66, 557 P.2d 929, 951, 135 Cal.Rptr. 345, 366-67 (1976)("Serrano II")(holding education "fundamental right" in striking down education finance scheme); Horton v. Meskill, 172 Conn. 615, 376 A.2d 359, 373, 374-75 (1977)("Horton I")(same); Pauley v. Kelly, 162 W.Va. 672, 255 S.E.2d 859, 878 (1979)(same); Washakie County School Dist. Number One v. Herschler, 606 P.2d 310, 330 (Wyo.), *cert. denied*, 449 U.S. 224 (1980)(same). By contrast, in the states whose courts have affirmed their finance scheme, only the Arizona and Wisconsin courts have held education a fundamental right. *See* Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590, 592-593 (1973)(holding education a fundamental right, yet refusing to strike down state scheme); *see supra* note 49 (state cases refusing either to hold education fundamental right or strike down state scheme); Buse v. Smith, 74 Wis. 2d 550, 247 N.W.2d 141, 149 (1976)(same). *But see* Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, 282, 295-98 (refusal to hold education fundamental right but striking state scheme on other grounds), *cert. denied*, 414 U.S. 976 (1973).

The Mississippi Supreme Court has shown a willingness to accord education the status of a fundamental right under state law. This willingness is supported by the state constitution's specific guarantees concerning education. If the Mississippi Supreme Court accepts such an argument in a case challenging funding disparities, then the court must demand more than a rational basis to justify the state's division of the state into rich and poor districts. More stringent review would provide considerable force in a challenge to funding disparities.[66]

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[57] *Serrano II*, 18 Cal. 3d at 765-66, 557 P.2d at 951, 135 Cal. Rptr. at 367.

[58] *Horton I*, 172 Conn. 615, 376 A.2d at 373-74.

[59] *Pauley*, 255 S.E.2d at 878.

[60] *Washakie County*, 606 P.2d at 333.

[61] *Serrano II*, 18 Cal. 3d at 765-66, 557 P.2d at 951, 135 Cal. Rptr. at 367.

[62] *Horton I*, 172 Conn. 615, 376 A.2d at 373. The court in *Horton I* did note that, because of the nature of school financing legislation, the court must do more "weighing" than is ordinary in traditional strict scrutiny analysis. *Horton I*, 172 Conn. 615, 376 A.2d at 374; *see* Horton v. Meskill, 195 Conn. 24, 486 A.2d 1099, 1105 (1985)("Horton II")(court concluded that it should eschew "formalistic reliance on the usual standards of the law of equal protection" in performing analysis); Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, 282 (1973)(noting that court analyzing school finance legislation must avoid "[m]echanical approaches" and must weigh denial against public justifications).

[63] *Pauley*, 255 S.E.2d at 878.

[64] *Washakie County*, 606 P.2d at 335.

[65] *See* Comment, *supra* note 15, at 331 & n.15 (citing Palmore v. Sidoti, 466 U.S. 429, 433 (1984) and Shapiro v. Thompson, 394 U.S. 618, 638 (1969) for equation of "compelling state interest" with "strict scrutiny").

[66] Challenges based on rational basis review alone should still be considered in spite of *Rodriguez* and the state cases cited in note 49. In Dupree v. Alma School District No. 30, 651 S.W.2d 90, 93-95 (1983), the Arkansas Supreme Court struck down the state's finance system as being irrational without reaching higher scrutiny or the question of whether education involved a fundamental right.

IV. The Structure of School Finance

A. The Foundation Plan

Under the minimum foundation program or foundation plan of school finances, the state sets a dollar level foundation of per-pupil spending guaranteed for each district. To qualify for the funds, districts must tax at a certain minimum property tax rate.[67] Any district that, taxing at the minimum level, fails to generate the "foundation" amount for each student, is given state funding to make up the difference.[68] This system—through inherent flaws and inadequacies in implementation— has resulted in gross inequalities in school funding.[69]

The foundation plan was the paradigm for school finance between the 1920s and the 1960s,[70] but during the sixties, efforts toward reform began in both state legislatures and the courts.[71] The reform efforts in the courts raised a broad range of equal protection challenges to foundation plan funding.[72] Prior to 1952, Mississippi had gradually moved toward foundation plan funding in efforts to resolve funding inequities. These cases all took as their touchstone the emphasis in *Brown* on education as "perhaps the most important function of state and local government".[73] After the first of these challenges failed,[74] Coons, Clune, and Sugarman, in *Private Wealth and Public Education*, attempted to build a framework for future arguments. Beyond their legal analysis—an attempt to demonstrate the unconstitutionality of funding disparities created by minimum program funding[75] — they described a proposal termed "Power Equalizing" designed to cure the disparity.[76] The purpose was to put all school districts on equal footing, so that the same tax rate would produce the same funds per pupil, regardless of a district's wealth.[77] The state equalization fund would compensate for any shortfall resulting from the local property values.[78] A district would still be able to decide the level of per pupil funding; the equalization mechanism would tell the local district the tax rate necessary to produce that per pupil amount.[79] The equalization mechanism would assure that equal effort (tax rates) would produce equal effect (per pupil funding).[80] In making this proposal, the authors recognized that the distribution of political power made true power equalizing unlikely;[81] for that reason, they built an equal protection argument aimed toward achieving a court-ordered mandate for equalization.[82]

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[67] S. Coons, W. Clune & S. Sugarman, *supra* note 9, at 64-65.

[68] Henke, *Financing Public Schools in California: The Aftermath* of Serrano v. Priest *and Proposition 13*, 21 U.S.F. L. Rev. 1, 3 (1986).

[69] J. Coons, W. Clune & S. Sugarman, *supra* note 9, at 63-72; *see infra* text accompanying notes 120-135 (discussing inequities in Mississippi's version of foundation plan funding).

[70] Prior to the advent of the foundation plan, proposals for state aid to education centered around various kinds of flat grants. For instance, Ellwood P. Cubberley, a pioneer in school finance theory, proposed a flat grant based on the number of teachers and other educational effort expended by the schools. *See* J. Coons, W. Clune & S. Sugarman, *supra* note 9, at 52-55 (discussing Cubberley's work).

[71] *Id.* at 64; Henke, *supra* note 68, at 3.

[72] *See* J. Coons, W. Clune & S. Sugarman, *supra* note 9, at 294-305 (discussing theories underlying court challenges).

[73] Brown v. Board of Educ., 347 U.S. 483, 493.

[74] *See* McInnis v. Shapiro, 293 F.Supp. 327, 332-36 (N.D. Ill. 1968), *aff'd mem. sub nom.* McInnis v. Ogilview, 394 U.S. 322 (1969)(rejecting equal protection challenge to Illinois version of foundation plan); *see generally*, Henke, *supra* note 68, at 9 (describing *McInnis* and history of challenges to foundation plan funding).

In *Rodriguez*, the United States Supreme Court stated that one problem with recognizing the equal projection challenge was the question of appropriate relief. The Court then discussed a somewhat confused version of power equalizing. The Court stated that power equalizing involved taking away property tax funds from wealthier districts to subsidize poorer districts.[83] However, Coons, Clune, and Sugarman specifically proposed that local districts be allowed to set their taxes and keep their tax proceeds.[84] Equalization would be through a state grant, not redistribution.[85]

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[75] J. COONS, W. CLUNE & S. SUGARMAN, *supra* note 9, at 394-433.

[76] *Id.*

[77] *Id.* at 202.

[78] *Id.* at 154-167, 201-203. The authors described how "percentage equalization", a system already in use in some states to achieve partial equalization, could be used to achieve complete equalization. *Id.* at 163. The mathematics are fairly simple. A key district must be selected. *Id.* at 165. To achieve full equalization without equalizing down, the key district must be the richest district. *Id.* at 165-66. The amount of state aid is a ratio, local wealth divided by key district wealth. *Id.* at 166.

[79] *Id.* at 203.

[80] *Id.*

[81] *Id.* at 202.

[82] *Id.* at 203.

[83] *Rodriguez*, 411 U.S. at 41 n.85.

Coons, Clune, and Sugarman recognized that the courts were not the ideal forum for crafting remedies to funding equity claims.[86] They pointed out the limited ability of courts — as opposed to legislatures — to propose specific solutions to funding inequity. This limited ability suggests respective roles for the courts and the legislatures in these cases: once a declaration of unconstitutionality occurred, the legislature should enact remedies that in turn would be tested in the courts. This has been the process followed by the states whose financing schemes have been struck down.[87] This is similar to the process that was used by the Fifth Circuit in school desegregation cases. After finding a school system segregated, the courts required the school to formulate a plan for desegregation; the plan was required to meet specific court-ordered guidelines.[88] In states that have struck down their educational finance schemes, the courts have followed essentially this process.[89]

The process in the states that struck down state schemes has led in the direction of power equalizing. California called its scheme "Power Equalizing".[90] The Connecticut and Arkansas remedies are in basic outlines quite similar to the California remedy.[91] Once a decision has been made to truly equalize school financing, some form of power equalizing is probably inevitable. Any other method would involve reducing the funds for wealthier—and usually more politically powerful—districts to raise the level of funding in the poorer districts.

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[84] J. Coons, W. Clune & S. Sugarman, *supra* note 9, at 202-03.

[85] *Id.* at 203.

[86] *Id.* at 293-94.

[87] New Jersey was the first state court to choose this route. *See* Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, 276, 298, (holding state scheme unconstitutional and delaying enforcement to give legislature opportunity to enact remedy), *cert. denied*, 414 U.S. 976 (1973). Similarly, the Connecticut scheme was struck down in Horton v. Meskill, 172 Conn. 615, 376 A.2d 359, 375 (1977) ("Horton I"). The remedy was reviewed in Horton v. Meskill, 195 Conn. 24, 486 A.2d 1099, 1107 (1985) ("Horton II"). In California, there were three reported decisions: Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) ("Serrano I"); Serrano v. Priest, 18 Cal.3d 728, 135 Cal.Rptr. 345, 557 P.2d 929 (1976)(*Serrano II*); and Serrano v. Priest, 181 Cal.App.3d 584, 226 Cal. Rptr. 584 (1986)(*Serrano III*).

[88] *See* Singleton v. Jackson Mun. Sep. School Dist., 419 F.2d 1211, 1217-22 (5th Cir.)(setting forth process of desegregation), *rev'd in part*, 425 F.2d 1211 (1970); *see also* F. Read & L. McGough, Let Them Be Judged: The Judicial Integration of the Deep South 432-436, 495-498 (1978)(discussing history of these cases).

[89] *See supra* note 87.

[90] *Serrano III*, 181 Cal. App. 3d 584, 226 Cal. Rptr. at 592.

B. Mississippi Under the Foundation Plan

Since 1952, Mississippi's state contribution to education has centered around the minimum program fund, an unalloyed version of foundation plan funding.[92] Prior to 1952, Mississippi had gradually moved toward foundation plan funding in efforts to resolve funding inequities. State contributions for education had begun with the common school fund, established during reconstruction.[93] Local contributions were to be primarily from property taxes. By the period immediately after the passage of the 1890 Constitution, the largest percentage of school funding consisted of state aid in the form of the per-capita distributed common school fund. In the mid-1890s, local contributions only amounted to fourteen percent.[94]

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[91] *Horton II*, 195 Conn. 24, 486 A.2d at 1101 n.2 (describing Connecticut's remedy); ARK. STAT. ANN. § 6-20-301 to -319 (1987 & Supp. 1987)(remedial statute enacted in Arkansas). New Jersey has chosen a different method. The state legislature created a complex remedy that involves per pupil full funding for certain programs, need-justified grants from state agencies, plus property tax subsidies to bring districts with sub-average property values up to average. *Robinson*, 69 N.J. 449, 355 A.2d at 136-137. Mississippi's most recent venture into equalization bears similarity to the last aspect of this remedy. *See infra* text accompanying notes 136-47 (describing 1989 act). However, the New Jersey act involved a complex series of other remedies, and a requirement that the state bear responsibilities for equal funding state-wide.

[92] The minimum program fund is established by MISS. CODE ANN. § 37-19-1 to -53 (Supp. 1988). *See infra* text accompanying notes 116-119 (describing current version of minimum program fund).

[93] *See* MISS. CONST. of 1868, art. VII, § 6 (establishing common school fund); W. HARRIS, THE DAY OF THE CARPETBAGGER 315 (1978)(describing origins of common school fund); E. MAYES, HISTORY OF EDUCATION IN MISSISSIPPI 283 (1899)(same). Local property taxes to support education began in the 1840's. *See id.* at 278-279 (discussing origins of property tax for financing education); Act of March 4, 1846, ch. 2, 1844 Miss. Laws 9 (act establishing local schools in Mississippi, providing financing through local property taxes).

[94] S. NOBEL, FORTY YEARS OF THE PUBLIC SCHOOLS IN MISSISSIPPI 79-91 (1918). Per pupil distribution led to complaints of inequity in distribution. The provision did not provide for lower contributions for black students, yet all districts spent less on blacks. This allowed predominantly black areas an advantage in educating their white students

The 1890 Constitution mandated a four-month term and per-pupil appropriation, requirements that led to the preeminent school funding issue between 1920 and 1940: how to use state funds to equalize the length of school terms state-wide? In 1912, the legislature attempted to supplement the common fund by providing that any county with insufficient funding to provide a four month term was to apply to the state board of education, which was to evaluate the application and "apportion [the supplemental] fund in accordance with the needs of the respective counties."[95] The following year, the supreme court held this statute unconstitutional because it did not follow the constitutionally-mandated per-pupil method for funding the minimum four months of school.[96]

In 1922, the legislature provided a fund to equalize school terms and salaries.[97] The fund was to be distributed by the state board of education "in such a manner as to equalize public school terms as nearly as possible throughout the state."[98] The act provided that it was not to take into account locally available funds. This effort to equalize state educational benefits was also challenged. Because this equalization fund was supplemental to the four month common fund, the court held that the constitutional requirement of per-pupil distribution did not apply.[99]

The funds provided under the 1922 act were distributed at the discretion of the state board of education, which based its distribution on need and actual tax effort.[100] In his 1929 report, the state superintendent of education indicated that the distribution method had become based upon local ability to generate taxes rather than the actual local effort. The distribution was to the counties based on "proportion of their need, their ability to

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by depriving black schools of funding and using the funds in white schools. *Id.* at 92-95.

[95] Act of March 6, 1912, ch. 5, § 2, 1912 Miss. Laws 6, 6-7; *see* State Bd. of Educ. v. Pridgen, 106 Miss. 219, 234, 63 So. 416, 418 (1913)(striking statute down as unconstitutional).

[96] *Pridgen*, 106 Miss. at 234, 673 So. at 418.

[97] Act of March 13, 1922, ch. 21, § 2, 1922 Miss. Laws 27, 27-28.

[98] *Id.* at 28.

[99] Miller v. State, 130 Miss. 564, 585, 94 So. 706, 709-710 (1923); *see* Hamiel v. Rice, 176 Miss. 462, 470-71, 169 So. 687, 689 (1936)(rejecting a similar challenge).

[100] *See* BIENNIAL REPORT AND RECOMMENDATIONS OF THE STATE SUPERINTENDENT OF PUBLIC EDUCATION 74 (1927)(describing how fund was distributed).

help themselves and their willingness to do their part."[101] This is similar to foundation plan funding—a county's ability to participate in the equalization fund was based on its ability to tax. By 1936-1937, the board was distributing the fund based on true foundation plan funding. To participate in the equalizing, the state board of education required a county to tax at the rate of fifteen mills.[102]

By 1936, the legislature recognized that the state's "equalizing fund" did not approach equalization of educational opportunity in Mississippi.[103] A report of a joint legislative special committee, appointed to examine the financial needs of the state's schools, noted that sixty-five percent of the white children in the state lived in counties containing only one-third of the state's taxable wealth.[104] These counties relied heavily on the state's equalization fund, yet, paying considerably lower teacher's salaries, were still in large part unable to maintain full terms of school.[105] The local funds available, combined with these counties' state funds (including the equalizing fund), still fell short of the amount necessary to provide a full school term for these counties.[106] Taxing at almost twice the rate of the counties wealthy enough to fund a full term without state funds,[107] these counties still could not provide teacher's salaries or other school expenditures comparable to that of the rest of the state, even at the proposed rate of increased state contribution and increased local taxes.[108]

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[101] Biennial Report and Recommendations of the State Superintendent of Public Education 9 (1929). This method was used for distribution until 1936. *See* Biennial Report and Recommendations of the State Superintendent of Public Education 11 (1935)(similar description of distribution); Biennial Report and Recommendations of the State Superintendent of Public Education 53 (1937)(same).

[102] Mississippi Joint Legislative Comm., 1936 2d Extraordinary Sess., Report of School Survey Comm. of the Mississippi Legislature 883 (1936) [hereinafter School Survey Report].

[103] *Id.* at 873-85 (report analyzing inequalities in school programs between districts). The report ignored the problem of equalizing expenditures for black children.

[104] *Id.* at 881. The 1936 report makes it clear that the disparities in property values in Mississippi were longstanding. By contrast, the Court in *Rodriguez* stated that disparities in Texas arose in more recent times. *See Rodriguez*, 411 U.S. at 7-8 ("Until recent times, [in] Texas. . .population and property wealth were spread relatively evenly across the State.").

[105] School Survey Report, *supra* note 102, at 875-78, 882-83, 887.

[106] *Id.* at 887.

[107] Of the 19 counties that did not need equalization, only Warren taxed at higher than six mils. *Id.* at 873.

In response to this report, the legislature codified the foundation method of distributing the equalizing fund.[109] Counties with insufficient funds to operate school for eight months a year were required to tax at ten mills to participate in the equalization fund.[110] A county that failed to participate at ten mills had its equalization funds reduced proportionately.[111]

At the special term of the legislature in 1953, the state adopted the minimum program in the form that, with some minor alterations, exists at present.[112] The bill set up a method for determining the cost of the minimum program, established the minimum ad valorem tax effort, and established a method for calculating the state contribution for the minimum program.[113] At the same time, the legislature established a State Educational Finance Commission and passed a bill providing for state aid for the construction of school facilities. The aid was distributed by the finance commission.[114] The bill establishing the commission stated that:

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[108] *Id.* at 882. The fallacy of "local control" as a rationale for foundation plan funding is highlighted by Mississippi's initial implementation. The counties that needed equalization funds were taxing at a rate comparable to the rest of the state, yet were forced to almost double their tax rate to continue to participate. *See id.* at 872-73 (stating that counties using equalization fund would have to almost double their tax rates to continue to participate). The legislation passed in response to the 1936 report limited local control even further for those counties that participated in the fund. They were allowed to spend no more for teacher salaries and transportation than authorized by regulations of the state board of education. Act of December 4, 1936, ch. 1, § 14, 1936 Miss. Laws 7, 13 (2d extraordinary session).

[109] Act of December 4, 1936, ch. 1, 1936 Miss. Laws 7 (2d extraordinary session); *see* SCHOOL SURVEY REPORT, *supra* note 102, at 885-87 (setting forth recommendations). At the same time, the legislature substantially reworked the statutes governing local school administration. Act of March 25, 1936, ch. 255, 1936 Miss. Laws 494 (regular session).

[110] Act of December 1, 1936, ch. 1, § 3(a), 1936 Miss. Laws 7 (2d extraordinary session).

[111] Act of December 4, 1936, ch. 1, §§ 3(c), 4, 1936 Miss. Laws 7.

[112] Minimum Program of Education Act, ch. 14, 1953 Miss. Laws 45; *see* MISS. CODE ANN. §§ 37-19-1 to -53 (Supp. 1988)(current version of minimum program).

[113] Minimum Program of Education Act, ch. 14, §§ 2-5, 1953 Miss. Laws 45.

[114] Act of December 28, 1953, ch. 11, 1953 Miss. Laws 19 (finance commission); Act of December 28, 1953, ch. 13, 1953 Miss. Laws 33 (construction aid). The 1953 special term was much occupied with education matters. *E.g.* Act of December 28, 1953, ch. 10, 1953 Miss. Laws 14 (establishing county boards of education); Act of December 28, 1953, ch. 16, 1953 Miss. Laws 70 (providing for meetings of school boards); Act of December

> [E]quality of educational opportunity with respect to instructional personnel, school buildings and facilities, transportation facilities, curriculum and all other school facilities should be provided all such children, that the burden of providing such equality of educational opportunity can no longer be borne entirely by the local taxing units, and, therefore, that a program of state aid therefor should be instituted. The legislature, therefore, declares and determines that the maintenance of the uniform system of free public schools to insure and provide substantial equality of educational opportunity is the joint responsibility of the State of Mississippi and the local taxing units thereof.[115]

The commission had no specific powers to enable it to achieve this goal.

The state's "minimum education program," in its present form is described by statute in terms of, first, a formula for calculation of teacher units (or the actual number of teachers, if less than the number produced by the teacher unit formula),[116] and a minimum salary scale.[117] The statute also provides for additional allotments for administration, support, and transporta-

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28, 1953, ch. 12, 1953 Miss. Laws 24 (providing for school district consolidation and reorganization); Act of December 28, 1953, ch. 23, 1953 Miss. Laws 107 (same); Act of December 22, 1953, ch. 25, 1953 Miss. Laws 116 (same); Act of December 28, 1953, ch. 15, 1953 Miss. Laws 59 (revision of laws concerning bus transportation); Act of December 28, 1953, ch. 18, 1953 Miss. Laws 84 (same); Act of December 28, 1953, ch. 17, 1953 Miss. Laws 78 (establishing process for classifying school districts); Act of December 28, 1953, ch. 19, 1953 Miss. Laws 88 (revising statutes governing the powers and duties of county superintendents of education); Act of December 28, 1953, ch. 20, 1953 Miss. Laws 94 (establishing the method for contracting with personnel); Act of December 3, 1953, ch. 21, 1953, Miss. Laws 104 (providing for auditing and accounts of schools); Act of December 15, 1953, ch. 22, 1953 Miss. Laws 105 (same); Act of December 22, 1953, ch. 24, 1953 Miss. Laws 114 (providing for keeping permanent school records); Act of December 28, 1953, ch. 26, 1953 Miss. Laws 118 (providing for a uniform system of grades and curriculum); Act of December 28, 1953, ch. 27, 1953 Miss. Laws 122 (revisioning statutes on lengths of terms and average daily attendance); Act of December 28, 1953, ch. 30, 1953 Miss. Laws 137 (regulating school debt); Act of December 9, 1953, ch. 31, 1953 Miss. Laws 141 (same); Act of November 17, 1953, ch. 37, 1953 Miss. Laws 146 (same).

[115] Act of December 15, 1953, ch. 11, § 1, 1953 Miss. Laws 19, 19 (codified at MISS. CODE ANN. § 37-45-1 (1972)).

[116] MISS. CODE ANN. § 37-19-5(1) (Supp. 1988).

[117] *Id.* § 37-19-7 (Supp. 1988).

tion.[118] To obtain the minimum program funding, a district has to achieve the minimum local and ad valorem effort established by statutory formula.[119]

Minimum program funding has not come close to assuring an equitable state-wide level of funding. For the 1986-1987 school year, the minimum program "assured" that each school system would have $1,308.70 per pupil.[120] This figure does not relate to the amount any county spent per pupil. The average county spent $2,494.89; even the poorest county, George County, spent $1,920.83.[121] Mississippi's "foundation" sets a floor far lower than any county actually spends.

The disparity in Mississippi's minimum program goes back to within ten years of the legislative enactment of the minimum program. A 1961 report on education to the Legislature's Education Study Committee found that, "The local financial ability to support schools is largely determined by [the] amount of real and personal property per pupil in the district."[122] The report concluded that the ability to finance schools was a factor of local wealth.

The irrationality of the disparities in funding between districts becomes stark when wealthy — often suburban — districts are compared to nearby or adjoining poor — often rural or blue-collar —districts. These disparities can invariably be traced back to disparities in property values. For instance, Long Beach and Pass Christian are neighboring towns. Their school districts adjoin.[123] Yet Pass Christian ranks third in state-wide funding per pupil and Long Beach 96th.[124] Pass Christian's higher tax base[125] allows it to spend a third again more than Long Beach,[126] while taxing at only three-fourths the millage of Long Beach.[127]

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[118] *Id.*

[119] *Id.* § 37-19-35 (Supp. 1988).

[120] This is the cost of the minimum program for 1986-87 ($619,729,997) divided by the state-wide average daily attendance (473,544). *See* State Superintendent of Public Education, Report to the Legislature of Mississippi of 1988 at 8, 27 (1988) [hereinafter 1988 Report] (state-wide minimum program cost and average daily attendance figures).

[121] *Id.* at 73-75.

[122] 1 Reports of Advisory Study Groups, Public Education in Mississippi 314 (1961). Some of the irrationality pointed out by this 1961 report has been dealt with by the state-wide real property reappraisal mandated by State Tax Commission v. Fondren, 387 So. 2d 712, 721 (Miss. 1980), *cert. denied*, 450 U.S. 1040 (1981).

[123] 1988 Report, *supra* note 120, at 73.

[124] *Id.* at 73. The millage and income figures in the 1988 report are for the 1986-87

Two districts in Bolivar County, Bolivar #2 and Bolivar #6, show similar disparities. Bolivar #2 has over six times the wealth per pupil of Bolivar #6.[128] Yet taxing at about a third the rate of Bolivar #6,[129] Bolivar #2 is able to spend fifty percent more per pupil than Bolivar #6.[130] This disparity is between Bolivar County's only district with a significant white student population, #2, and a district in the southern part of the county, #6, which is almost exclusively black.[131]

Lee County presents a large urban/rural disparity. The Tupelo Municipal School District generates $685.82 per pupil from local property taxes; Lee County generates only $199.48.[132] This allows Lee County to spend only eighty percent of the amount per pupil that Tupelo spends.[133]

In each of these counties, the higher per-pupil spending is accompanied by far higher per-pupil property values. The disparities are a direct function of local property values, a factor completely outside the control of local school boards. The disparities occur in spite of efforts by the poorer local boards to even the disparities by taxing at a higher rate. The disparities are therefore not a function of "local control" by local boards.

This highlights the great irony — and the falsity — of a central rationale for *Rodriguez*. The Court saw the need for "lo-

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school year. *Id.* at 61-66.

[125] Pass Christian ranks first in assessed value of property per pupil, while Long Beach ranks forty-fourth. *Id.* at 80.

[126] Pass Christian spends $3,348.61 per pupil, while Long Beach spends $2,254.19. *Id.* at 73.

[127] Pass Christian taxes at 30.5 mills, Long Beach at 44.10. *Id.* at 65.

[128] Bolivar #2 has $30,741.89 in assessed property per student, while Bolivar #6 has $4,917.75. *Id.* at 79.

[129] Bolivar #2 taxes at 14.4 mills; Bolivar #6 at 46.63 mills. *Id.* at 63.

[130] Bolivar #2 spends $3,745.20 per pupil; Bolivar #6 spends $2,379.98 per pupil. *Id.* at 73.

[131] *See* BUREAU OF CENSUS, BOLIVAR CONSOLIDATED SCHOOL DISTRICT NO. 2, at 6 (CENSUS OF POPULATION AND HOUSING 1980: SUMMARY TAPE FILE 3E MISSISSIPPI, 1982); BUREAU OF CENSUS, BOLIVAR CONSOLIDATED SCHOOL DISTRICT NO. 6, at 6 (CENSUS OF POPULATION AND HOUSING 1980: SUMMARY TAPE FILE 3F, MISSISSIPPI, 1982).

[132] *Id.* at 80.

[133] Tupelo spends $2,597.6 per pupil, while Lee County spends $2,127.05. *Id.* at 74.

cal control" of school funding as a rationale for foundation plan funding.[134] Yet under foundation plan funding, local wealth, a factor totally uncontrollable by local boards, determines the level of spending a board can achieve. Lee County's school board does not "control" its status as poorer than the Tupelo Municipal School District. It has no control over its lesser ability to generate school funding.[135]

At the 1989 term of legislature, a proposal passed that purported to end some of the disparity in funding. Instead of using the "Power Equalizing" approach, keying all state-wide funding on one district, this bill set up a fund that purported to assure that no district would be able to fund at a rate lower than average.[136] The Act states that its purpose is that "each student counted in average daily attendance in the public schools in Mississippi will have equal access to funds generated by a uniform minimum school district ad valorem levy."[137] The bill has the apparent goal of assuring that any district that cannot meet the state average is given additional state funds from the Uniform Millage Assistance Grant to bring the district up to just below the state average.[138] The bill provides for equalization grants tied to a property tax millage rate. The rate is set at four mills less than state average until 1993, after which the 1993 average is to be used.[139] After 1993, when the figure is no longer tied to the current averages, the "equity" provided by the bill will decrease as state averages change.[140] At four mills less than state average, this bill will provide $71.70 less per student than the average county obtains per student from property taxes.[141]

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[134] San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 53 (1973).

[135] Unintentionally ironic arguments recurred and were rejected in *Papasan*. The state officials argued that "local control" justified their denial to thirty-nine school districts of any participation in income from the school lands. Papasan v. Allain, 478 U.S. 265, 271 (1986). The state officials did not explain how local boards might "control" lands they did not own. *Id.*

[136] S. 2254, 1989 Miss. Reg. Sess.

[137] *Id.* § 1. The Act also has a separate provision, designed to encourage school consolidation, that provides funding of $36 per pupil for any county consisting of one school district. *Id.* § 1(3).

[138] *Id.* § 1(2)-(4).

[139] *Id.* § 1(2)(c).

[140] The version of the bill that had passed the Senate had simply set the grant at 25 mills. S. 2254, 1989 Miss. Reg. Sess. § 1 (as passed by Senate). Using figures from 1986-87, this would have been very close to four mills less than the state average of 29 mills. *See* 1988 REPORT, *supra* note 120, at 61-66 (listing the millage figures for all 158

The Act's grant calculation begins with calculation of state-wide total revenue from certain property taxes at the state average less four mills.[142] This figure is then divided by the state-wide average daily attendance to produce a state-wide per pupil average.[143] Each district's property tax "goal" is calculated as their average daily attendance multiplied by the state-wide per pupil average.[144] The Act purports to raise to this goal any district whose actual property taxes at the established millage rate fall short.[145] The stated goal of the Act is to bring the poorest districts up only to just short of average; the Act will close some of the existing gap but will leave in place much of the disparity between the richest and poorest districts.

The Act has "tricks" built into its formula that reduce its ability to equalize funding. The Act requires the state to subtract sixteenth section land income, including Chickasaw School Fund appropriations by the legislature.[146] A wealthy school district (with higher-than-average property tax revenues) will also have higher-than-average sixteenth section land revenues. It gets to keep both. Yet the sub-average districts (with likely sub-average sixteenth section land revenues) are pulled back from the "average" revenues promised by the Act. The Act also subtracts interest on surplus funds, severance taxes, Grand Gulf income, TVA in-lieu revenues, and national forest revenues.[147] The formula established by the Act, already designed to fall well short of average, is made even less equitable by these subtractions.

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districts).

[141] *See* 1988 REPORT, *supra* note 120 at 11, 26 (tax revenue and average daily attendance figures).

[142] S. 2254, 1989 Miss. Reg. Sess. § 1(2)(b).

[143] This figure was called the "maximum yield at 25 mills" in the Senate version and the "maximum yield at the uniform minimum school district ad valorem tax levy" in the House and final version. *Id.*§ 1(1)(b)(as passed by Senate); *id.* § 1(2)(c) (as amended by House); *id.* § 1(2)(c) (as passed).

[144] *Id.* § 1(2)(d)-(e) (as passed).

[145] *Id.* § 1(2)(f) (as passed).

[146] *Id.* § 1(2)(g) (as passed).

[147] *Id.* (as passed).

IV. CONCLUSION

Prior to the 1989 act, Mississippi's scheme for school finance centered around its version of the foundation plan, which is substantially identical to the scheme challenged in *Rodriguez.* While the 1989 act removes some of the disparities inherent in Mississippi's version of the foundation plan, it still leaves substantial disparities in place. The 1989 act does not abandon foundation plan financing; it just sets a new, floating foundation at the state average. There will still be a class of schools stuck at the bottom—those receiving subsidies under the 1989 act—and another class of wealthier schools that have substantially greater funds available. Because the 1989 act presents a change in degree only, and leaves in place the distinctions between wealthier and poorer districts, the 1989 act should not remove any vulnerability to constitutional challenge inherent in Mississippi's financing scheme.

Because Mississippi's financing scheme bears great resemblance to the Texas scheme upheld in *Rodriguez*, a federal equal protection challenge to the scheme would most likely fail. However, *Rodriguez* is not invincible. It seemed clear to the Fifth Circuit that *Rodriguez* completely foreclosed the challenge to state distribution of sixteenth section lands income in *Papasan.*[148] In reversing the Fifth Circuit, the Supreme Court distinguished *Rodriguez* with apparent ease.[149] Nevertheless, it would seem difficult to sustain a federal equal protection challenge to Mississippi's school finance scheme, and would require a creatively designed claim.

There is support for a challenge based on the state constitution. Mississippi's due process clause provides guarantees much like those provided by the equal protection clause of the fourteenth amendment. Where ordinary economic regulation has been involved, the Mississippi Supreme Court subjects that regulation to rational basis review. However, the Mississippi Supreme Court has stated that education is a fundamental right in Mississippi. If the Mississippi Supreme Court follows this statement through to its logical consequences, it may well follow the lead of other states that view education as a fundamental right and require the state to substantially justify distinctions drawn in the area of education. If the Mississippi Supreme Court adopts this view, then a state constitutional challenge to Mississippi's education finance scheme should prevail.

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[148] Papasan v. Allain, 756 F.2d 1087, 1095 (5th Cir. 1985).

[149] *Papasan*, 478 U.S. at 265; *see supra* note 25, 32-34 and accompanying text.

THE HISTORY AND FUTURE OF SOVEREIGN IMMUNITY FOR MISSISSIPPI SCHOOL DISTRICTS

Owen T. Palmer, Jr.

I. INTRODUCTION

For more than a hundred years, school districts in Mississippi enjoyed the royal treatment following the theory that "the King can do no wrong."[1] Over the years, absolute immunity for school districts was eroded by specific state and federal legislative exceptions[2]; but general immunity as to usual tort actions remained intact in Mississippi until the Mississippi Supreme Court's historic decision in *Pruett v. City of Rosedale.*[3] The State of Mississippi, its political subdivisions and agencies, and its municipalities and their agencies were all included in the broad scope of the court's decision.[4] Prior to *Pruett*, only scattered attacks on the shield of sovereign immunity had reached the Mississippi Supreme Court.[5] Mississippi had remained one of the few states which continued to recognize the broad doctrine of sovereign immunity for school districts.[6] In *Pruett*, the Mississippi Supreme Court refused to abrogate sovereign immunity either retroactively or currently.[7] The court did, however, unanimously provide a future window of immunity which, for a time, would leave the question of continuation of sovereign immunity to the state legislature.[8]

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[1] *See* Pruett v. City of Rosedale, 421 So. 2d 1046, 1047 (Miss. 1982) (outlining history of sovereign immunity in United States).

[2] *See, e.g.*, Brown v. Wichita State Univ., 540 P.2d 66, 78 (Kan. 1975) (municipalities immune in performance of governmental function).

[3] 421 So. 2d 1046 (Miss. 1982).

[4] *Pruett*, 421 So. 2d. at 1052.

[5] *See generally* Owens v. Jackson Mun. Sep. School Dist., 264 So. 2d 892, 892 (Miss. 1972) (held state and subdivisions immune from suit in tort actions); Harrell v. City of Jackson, 229 Miss. 815, 92 So. 2d 240, 244 (1957) (school board protected by sovereign immunity and held not liable for property damages); Fernwood Rural Sep. School Dist., 170 Miss. 35, 154 So. 268, 269 (1934) (absent statutory authority, rural school district held immune from suit); Nabors v. Holly Bluff Consol. School Dist., 135 Miss. 608, 100 So. 177, 177 (1924) (governmental subdivisions such as school districts held protected from suit by sovereign immunity); Ayres v. Board of Trustees of Leake County Agricul. High School, 134 Miss. 363, 98 So. 847, 850 (1924) (state and governmental subdivision held immune from suit in breach of contract action against agricultural school).

For those observers in 1982 who thought that all forms of sovereign immunity soon would pass into oblivion, Mark Twain's comment that "the news of my death has been greatly exaggerated" was most applicable to subsequent occurrences. Since 1982 the question of how to deal with the court's decision has been debated, not only in the halls of the state legislature, but also in corporate board rooms, union halls, and chambers of city, county and school authorities. The debate has been swept along with the general tide of tort reform. This article will focus on the following aspects of sovereign immunity in Mississippi:

1) the protection of sovereign immunity which school districts have enjoyed in matters of tort litigation;

2) several of the exceptions to the doctrine which have been adopted by federal and state legislation;

3) state legislation which has been enacted in response to the mandate of the Mississippi Supreme Court; and

4) the role of the State Fiscal Management Board in assisting Mississippi school districts in facing the challenge of sovereign immunity.

II. SCHOOL DISTRICTS PROTECTED BY THE DOCTRINE OF SOVEREIGN IMMUNITY

Because public education in Mississippi has historically been considered an exclusively governmental function,[9] few attorneys for injured plaintiffs have tested the appellate waters to challenge sovereign immunity as enjoyed by Mississippi school districts. Prior to 1982 only a handful of cases reached the appellate court system for an interpretation of the issue.[10] Before the adoption of the Mississippi Rules of Civil Procedure in 1982, an attorney for the defendant-school district usually responded to the plaintiff's declaration with a general demurrer which was sustained with no appeal in most instances.[11] After the adoption of the Mississippi Rules, Rule 12(b)(6) or 12(c) defenses provided the same purpose as a general demurrer, either of which could be considered before a trial on the merits of the case.[12]

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[6] *See* "A WORD ON . . .", Office of the General Counsel of the National School Boards Association (Aug. 1988) (table listing state-by-state statutory tort liability waivers of school district sovereign immunity) (attached as Appendix I); MISS. CODE ANN. § 11-46-5(1) (Supp. 1987) (doctrine of sovereign immunity extended in Mississippi until October 1, 1989).

[7] *Pruett*, 421 So. 2d at 1052. The court recognized that if sovereign immunity was immediately abolished, the state and the local subdivisions would not have sufficient time to make the necessary preparations to deal with the potential liability. *Id.*

[8] *Id.* The court delayed the effective date of its opinion until July 1, 1984, in order to allow at least two sessions of the state legislature to consider any conditions or problems incident to the abrogation of sovereign immunity. *Id.*

The few cases perfected for appeal on the issue of sovereign immunity have been disposed of rather summarily by the Mississippi Supreme Court with brief, and in some instances, unnecessarily confusing language. For example, Justice Gillespie, in a very brief opinion,[13] stated:

> The excellent briefs filed in this case present the question whether this Court should overrule its former decisions holding the State and its subdivisions immune from suit in tort actions except (1) *in matters concerning proprietary affairs* and (2) where immunity has been abrogated by statute. We had the same question presented earlier in this term and without written opinion rejected the argument that sovereign immunity should be abrogated. A careful study of the arguments has again been made, and we affirm our former decisions.[14]

In recent years, particularly in larger school districts, extracurricular activities and special projects have been viewed as extending the mission of education far beyond the usual "reading, writing and arithmetic." Questions have been raised whether such activities are "proprietary" in nature, and if so, whether school districts retain sovereign immunity.[15]

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[9] B. Anderson, The Law and the Teacher in Mississippi: A Guide for Teachers, Administrators, and Potential Teachers 11 (1975). The rationale of this doctrine is derived from the tenth amendment to the United States Constitution which allocates to the states those powers not delegated to the federal government. The tenth amendment thus has been interpreted as giving the states control of education. *Id.*

[10] *See supra* note 5.

[11] *See, e.g.*, *Ayres*, 134 Miss. 363, 98 So. at 847 (demurrer of defendant board of trustees sustained and suit dismissed since no statute authorized suits against agricultural high schools).

[12] *See* Miss. R. Civ. P. 12(b)(6) (1988) (motion for failure to state claim upon which relief may be granted); Miss. R. Civ. P. 12(c) (1988) (motion for judgment on pleadings).

[13] *Owens*, 264 So. 2d at 892.

[14] *Id.* (emphasis added).

The Gulfport Municipal Separate School District faced the problem of interpreting the scope of "proprietary affairs" in *Boyd v. Gulfport Municipal Separate School District*.[16] At a junior high school football game where an admission price was charged, a junior high school student sustained injuries after becoming embroiled in a fight with another group of students on the unlighted stadium parking lot.[17] Suit was filed on the student's behalf in the United States District Court for the Southern District of Mississippi seeking actual damages in the amount of $500,000 and punitive damages in the amount of $500,000.[18] Although the district judge sustained the defendant's motion for summary judgment, the opinion left in doubt the issue of whether the district might be liable for what the plaintiff alleged to be "proprietary activities."[19] Not only did the unsuccessful appeal by the plaintiff to the United States Court of Appeals for the Fifth Circuit answer this issue succinctly, but the reported decision also clearly summarized the history, both legal and factual, of the right of school districts in Mississippi to invoke the protection of sovereign immunity for all tort claims with no applicable statutory exception.[20]

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[15] *Id.* Since the decision excepted matters concerning proprietary affairs, this area was left open for basing a challenge upon sovereign immunity. *Id.*

[16] 821 F.2d 308 (5th Cir. 1987).

[17] *Boyd*, 821 F.2d at 309. The plaintiff claimed that the school district was negligent in failing to provide a reasonably safe place from which to depart the stadium. *Id.*

[18] Boyd v. Gulfport Mun. Sep. School Sys., No. S85-1363(R), slip op. at 1 (S.D. Miss. May 15, 1986) (mem.).

[19] *Id.* at 11. Judge Russell stated: "Therefore, the question is whether the defendant school district was acting in a governmental capacity exercising governmental functions, or in a private, proprietary capacity at the incident." *Id.* (citing *Owens*, 264 So. 2d at 892). Judge Russell also noted that "[t]here is no Mississippi case law deciding the question of whether the operation of a stadium by a school district for extra-curricular activities constitutes a governmental function or a proprietary function." *Boyd*, No. S85-1363 (R), slip op. at 10-11 (S.D. Miss. May 15, 1986). Judge Russell resolved the issue conclusively by stating that:

> [E]ach of the above cited cases have followed a similar rationale; that extracurricular activities are educational in nature, for the benefit of the student and thus governmental. The court is of the opinion that the Mississippi court, even in light of *Pruett*, would hold similarly to the above line of cases.

Id. at 14-15.

Two questions faced the Gulfport school district in responding to appellant's claims: whether since the incident occurred subsequent to the *Pruett* decision, the defendant-school district was shielded by the window of immunity provided by that case,[21] and whether the nomenclature used in the designation of municipal school districts, as well as the statutory law providing substantial financing of these districts by the municipalities, created a casual impression that municipal districts might be agencies of municipalities and thus liable for torts committed in the course of proprietary activities.[22] The appellant-plaintiff in *Boyd* based his argument regarding the latter questions on the language in *Owens v. Jackson Municipal Separate School District* that school districts could be involved in proprietary activities, and, therefore, not entitled to the protection of sovereign immunity for those activities.[23]

At the time of the appeal of the *Boyd* case, the doctrine of sovereign immunity had few supporters on the federal bench. Fortunately, the panel recognized the problems associated with abrogating sovereign immunity immediately, as well as the need to provide relief during the transition period.[24] The *Boyd* court stated:

> Of course, the courts, as well as the legislature, have the undoubted right to abrogate the doctrine of sovereign immunity. We are of the opinion, however, that the legislature is in a better position to limit and restrict claims that can be asserted and to provide the ways and means for paying of such claims (either by taxation or appropriation), if it should see fit to do

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[20] *Boyd*, 821 F.2d at 309-11.

[21] *See Pruett*, 421 So. 2d at 1052 (court realized that immediate abolition of sovereign immunity would catch state and municipal governments unprepared).

[22] *Boyd*, 821 F.2d at 309-10. The court noted that although in many states school districts derive their immunity from the immunity of the municipality, Mississippi has consistently recognized school districts as agencies of the state and not of the municipality. *Id.*

[23] *See supra* note 13 and accompanying text.

[24] *Boyd*, 821 F.2d at 311.

> so. Therefore, we decline to abolish the doctrine of governmental immunity at this time by judicial decision.
>
> Abrogation of sovereign immunity strongly appeals to the sentiments of us all, but, if it were done as sought by the appellant, it would leave every state agency, institution or branch of government vulnerable to tort suits. We think abrogation, if ever accomplished, should be accomplished by legislation alluded to by Justice Robertson in *Berry v. Hinds County*. . . .[25]

Thus, the opinion in *Boyd* emphatically reiterated that sovereign immunity would not be abrogated and that all school districts in Mississippi were agencies of the state, not of the municipality.[26]

Therefore, since 1986, subject only to implementation of legislation mandated by *Pruett*, the right of Mississippi school districts to rely upon the doctrine of sovereign immunity in the usual tort case has been conclusively settled both in state and federal jurisdictions. It is immaterial whether the activities of a Mississippi school district are classified as purely governmental or perhaps partially proprietary. All school districts, whether municipal, municipal separate, consolidated, or other, are agencies of the State of Mississippi and thus generally immune from tort claims, subject to certain exceptions.[27]

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[25] *Id.* (quoting Jones v. Knight, 373 So. 2d 254, 256-57 (Miss. 1979)).

[26] *Boyd*, 821 F.2d at 309-10. An earlier decision by the United States District Court for the Southern District of Mississippi unequivocally gave judicial certainty to the fact that all school districts were agencies of the state and not of the municipalities. Stevens v. Brookhaven Mun. Sep. School Dist., 5 F. Supp. 629, 629 (S.D. Miss. 1934).

[27] Miss. Const. art. VIII, § 201 states "[t]he legislature may, in its decision, provide for the maintenance and establishment of free public schools for all children between the ages of six (6) and twenty-one (21) years, by taxation or otherwise, and with such grades, as the legislature may prescribe." *Id.* Pursuant to the constitutional authority contained in that article, the legislature has from time to time enacted legislation dealing with school districts and their boards of trustees. In 1986, the Mississippi legislature adopted what is now referred to as the Mississippi Uniform School Law, which effectively codified the authority, duties, and responsibilities imposed upon school districts and their boards of trustees. Mississippi Uniform School Law, 1986 Miss. Laws ch. 492 (codified as amended at Miss. Code Ann. §§ 37-7-301 to -333 (Supp. 1988)).

III. STATE AND FEDERAL ACTIONS WHICH HAVE ERODED THE DOCTRINE OF ABSOLUTE SOVEREIGN IMMUNITY

A. The Accident Contingency Fund

Until the 1950s, no remedies were available to pupils or the public for injuries sustained because of negligence of school personnel. In the Extraordinary Session of the Mississippi Legislature in 1953, the legislature established the Accident Contingency Fund, which was then codified as section 63-36-19 of the Mississippi Code of 1942.[28] This legislation authorized claims asserted by *pupils only* who might be injured as a result of negligence by school employees operating school buses.[29] The initial law covered only county school districts and those municipal separate school districts with added territory outside the boundaries of the municipalities.[30] The maximum coverage available through the Accident Contingency Fund was set at:

> . . . the total amount of five thousand dollars ($5000.00) exclusive of court costs for any one child sustaining such injuries or damages, and provided further that no such claim shall be paid from any other fund other than the accident contingency fund as hereinabove provided.[31]

Chapter 394 of the General Laws of 1964 extended the coverage of the Accident Contingency Fund to include damages to *any person* and/or damage to property resulting from negligent acts of school employees in operating a bus or other vehicle used for transportation of students.[32] The limits of liability were also increased to $5,000 per person, $50,000 per accident, $500 for property damage, and $250 for hospital and medical expenses per person per accident.[33] In 1982, subsection 15 of section 37-41-41 was amended to increase the maximum limits of recovery.[34]

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[28] Accident Contingency Fund Act, 1953 Miss. Laws ch. 15 (codified as amended at MISS. CODE ANN. § 37-41-41 (Supp. 1988)).

[29] *Id.* § 18(a). Section 18(a) of the Act gave a cause of action to any school pupil injured by the negligent operation of any county or municipal separate school district school bus or other vehicle. *Id.*

[30] *Id.* § 2.

[31] *Id.* § 18(d).

[32] 1964 Miss. Laws ch. 394 (codified as amended at MISS. CODE ANN. § 37-41-41 (Supp. 1988)). Chapter 394 amended § 18(a) to extend coverage to any person injured or property damaged by the negligent operation of any county or municipal separate school district school bus or other vehicle. *Id.* § 18(a).

Until 1978 the statutes creating the Accident Contingency Fund applied only to county school districts and those municipal separate school districts with added territory.[35] In the case of the municipal separate school district, the protection extended only to those buses and other vehicles transporting students who resided in the added territory and whose attendance center was located more than one mile from the student's residence.[36]

The statutes enacted in 1984 in response to *Pruett* provided that the law creating the Accident Contingency Fund would terminate upon the date of abrogation of sovereign immunity, with any surplus funds being paid into the "Tort Claims Fund."[37] Since the date for the abrogation of sovereign immunity has been extended from year to year by the legislature, the Accident Contingency Fund has remained basically unchanged, awaiting its demise along with the other vestiges of sovereign immunity in

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[33] *Id.* § 18(d).

[34] See 1982 Miss. Laws ch. 354 (codified as amended at MISS. CODE ANN. § 37-41-41 (Supp. 1988) (liability limits set at $10,000 per person, $50,000 per accident, $1,000 for property damage, and $1,000 for medical expenses).

[35] 1953 Miss. Laws ch. 15 (codified as amended at MISS. CODE ANN. § 37-41-41 (Supp. 1988). For example, the 1953 Accident Contingency Fund Act applied only to county boards of education and boards of trustees of municipal separate school district with added territory outside of the municipal corporate limits, while specifically excepting municipal separate school districts. *Id.*

[36] *Id.* In 1978, several municipal separate school districts within the state joined in a suit in the United States District Court for the Northern District of Mississippi alleging that MISS. CODE ANN. 31-41-3 (1972), which authorized reimbursements to districts furnishing transportation to students, failed to include reimbursement for students residing within municipalities, therefore, violating the equal protection clause of the fourteenth amendment of the United States Constitution. Johnson v. Summer, 488 F. Supp. 83, 84 (N.D. Miss. 1980). The school districts also alleged that excluding the protection of the Accident Contingency Fund to such students was discriminatory. *Id.* While the state legislature was in session in 1978, Judge Orma Smith submitted a bench opinion holding that the existing statute violated the equal protection provisions of the Constitution and discriminated against the residents of the municipalities. *Id.* As a result of this decision, the legislature enacted Chapter 483 of the General Laws of 1978 to extend reimbursement for transportation to all school districts within the state. 1978 Miss. Laws ch. 483 (codified as amended at MISS. CODE ANN. § 37-41-3 (Supp. 1988)).

[37] 1973 Miss. Laws ch. 477 (codified as amended at MISS. CODE ANN. § 37-7-304 (Supp. 1988)).

Mississippi.

B. Authority of School District to Acquire Liability Insurance

In 1973, another potential inroad was made upon the doctrine of absolute sovereign immunity in vehicular cases. Chapter 477 of the General Laws of 1973 afforded school districts the option to purchase liability insurance on its various vehicles, other than school buses, and excess liability insurance on buses operated by the district.[38] Despite the added costs, a number of school districts have taken advantage of this authority. The rationale of those districts and their trustees is that the employees, students, and the general public have a basic right to protection in excess of the minimum limits and restrictions upon liability afforded by the Accident Contingency Fund.

With the erosion of sovereign immunity by both state and federal legislation, teachers, administrators, and trustees have been exposed to considerable personal liability arising out of nonpersonal injury litigation. Districts have sought additional protection for their trustees and employees. Chapter 355 of the General Laws of 1974 gave to all school districts the authority to purchase liability insurance to provide that additional protection.[39] Because teachers and administrators in some instances have liability insurance through their professional organizations, the policies available to school districts provide that such coverage for administrators and teachers is secondary and/or in excess of the policies which this group may have secured either individually or through other sources. The two companies which have made such policies available to school districts have been St. Paul Fire and Marine and National Union Fire Insurance. More than half of the school districts in the country have obtained coverage from the latter company since the policy it offers is reasonably broad. These policies usually do not protect the trustees and other employees from claims arising out of personal injuries. The present coverage (perhaps somewhat modified) as afforded by these particular liability policies will probably remain available to districts even if the school districts adopt the plan offered by the State Fiscal Management Board, discussed hereinafter.

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[38] *Id.*

[39] 1974 Miss. Laws ch. 355 (codified as amended at MISS. CODE ANN. § 37-7-319 (Supp. 1988)).

C. *School Employment Procedures Act*

For many years the legislature has been inundated with demands by teachers and administrators for tenure based upon statutory authority. The response was the adoption in 1974 of the School Employment Procedures Act (SEPA).[40] Although the act avoids the question of tenure, it does provide a very strict procedure of review when contracts of administrators and teachers are not renewed.[41] Prior to the adoption of SEPA, there were no statutes which afforded any procedural protection to teachers and administrators whose contracts were not renewed. Sovereign immunity provided the necessary defense in an action against a school district unless brought under the legal authority of certain federal acts.

Since the effective date of SEPA, many school districts have incurred considerable expenses, both for hearing costs and attorney's fees in defending actions involving nonrenewal of contracts. A few districts have sustained substantial damages because of failure to follow the strict procedural schedule outlined by SEPA or because nonrenewal of the contract was based on a constitutional or statutory violation of the rights of teachers or administrators.[42] SEPA served to remove from districts who may have violated the provisions of that act the right to assert sovereign immunity.

D. *Workers Compensation*

For many years, school districts have enjoyed the option of covering their employees under the Workers' Compensation Act.[43] Because school districts and their trustees considered themselves immune from lawsuits by employees who might be injured during the course of employment and because of local financial restraints, most school districts did not take advantage of this option. In recent years, however, demands by teachers and other employees for some protection from job-related injuries have resulted in a scattered number of districts throughout the state securing workers' compensation coverage. The prospective loss of the protection of sovereign immunity has resulted in the amendment of section 71-3-5 of the Mississippi Code to require that after October 1, 1989, any political subdivision, as defined in section 11-46-1,[44] "shall come under the provision of the Workers' Compensation law."[45] Section 37-7-303 provides that two or more public school districts may enter into agreements to purchase their workers' compensation coverage with a single policy of insurance through a carrier authorized to insure such liability in this state.[46] Purchase of contracts must be selected after competitive bids.[47]

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[40] School Employment Procedures Act, MISS. CODE ANN. § 37-9-101 to -113 (1988).

[41] *See* MISS. CODE ANN. § 37-9-105 (Supp. 1988) (requiring school district to give written notice of non-renewal of employment contract within seven days of decision not to re-employ); MISS. CODE ANN. § 37-9-109 (Supp. 1988) (outlining rights to which employee is entitled upon written request).

[42] *See* Claiborne County Bd. of Educ. v. Martin, 500 So. 2d 981, 985 (Miss. 1986) (new contract with back pay ordered when contract not renewed because of political activities).

E. Limitation on the Defense of Sovereign Immunity under Federal Legislation

Since the 1960s, Mississippi school districts have seen the protection of sovereign immunity with regard to certain claims eroded by federal legislation. With the enactment of the various civil rights acts beginning in 1964, school districts became vulnerable under Title VI[48] and VII[49] to charges of discrimination. Enforcement of these titles is delegated to the Equal Employment Opportunities Commission and the Office of Civil Rights.[50] The Justice Department has also used section 1983 of Title 42 of the United States Code to assure that school districts comply with the various legislative acts.[51] In addition, section 1983 has been used in private litigation.[52] Fortunately, few school districts in the state have been faced with litigation by private citizens under this section since most of the suits have involved municipalities and the state.

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[43] MISS. CODE ANN. § 71-3-5 (Supp. 1988). Section 71-3-5 states, in part, that "[a]ny state agency, state institution, state department, or subdivision thereof, including counties and municipalities or the singular thereof,. . . may elect, . . . to come within [the provisions of the Workers' Compensation Law]." *Id.*; *see* Adams v. Petal Mun. Sep. School Sys., 487 So. 2d 1329, 1330 (Miss. 1986) (exemption of school districts from mandatory worker's compensation has rational basis and does not impinge equal protection rights of injured employees).

[44] 1984 Miss. Laws ch. 495 (codified as amended at MISS. CODE ANN. § 11-46-1(f) (Supp. 1988)). Subsection (f) of § 11-46-1 defines "political subdivision" as "any body politic or body corporate other than the state responsible for governmental activities only in geographic areas smaller than that of the state, including any county, municipality, school district. . . ." *Id.*

[45] MISS. CODE ANN. § 71-3-5 (1972).

[46] 1986 Miss. Laws ch. 492 (codified as amended at MISS. CODE ANN. § 37-7-303 (Supp. 1988)).

[47] *Id.*

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[48] Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-6 (1982). Title VI states that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.* § 2000d. Title VI has been used primarily in the context of discrimination. *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 270 (1978) (special admissions program of medical school violated Title VI, California constitution, and equal protection clause); Lau v. Nichols, 414 U.S. 563, 566 (1974) (failure of school system to provide language instruction was violation of Title VI).

[49] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1982). Title VII states, in part, that:

> [i]t shall be an unlawful employment practice for an employer -
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national original; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

Id. § 2000e-2(a).

[50] *Id.* § 2000e-4(b)(1).

[51] *Id.* § 1983 (1982). Section 1983 states, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state. . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

[52] *See, e.g.*, Kingsville Indep. School Dist. v. Cooper, 611 F.2d 1109, 1112 (5th Cir. 1980) (independent school districts are subject to suit under § 1983); Flores v. Edinburg Consol. Indep. School Dist., 554 F. Supp. 974, 980 (S.D. Tex. 1983) (injured public school student can maintain civil rights action against school district), *reh'g denied*, 747 F.2d 1465 (5th Cir. 1984) (en banc).

Title IX of the Education Act of 1972, which requires that all school programs be available to both sexes, has provided another escape from the doctrine of sovereign immunity, acting as a vehicle for attacks on programs offered at elementary, secondary, and higher education levels.[53]

The enactment of section 504 of the Rehabilitation Act of 1973[54] and the Education for All Handicapped Children Act in 1975[55] has increased financial burdens on Mississippi school districts by requiring compliance with these acts as well as necessitating defense of claims regarding placement, suspension and expulsion of students and employment of staff. In 1987, by amendment to the Education for All Handicapped Children Act, school districts were subjected to possible additional financial costs for attorney's fees in the event the school district did not prevail in an administrative or court proceeding.[56] In all claims under the above acts, Mississippi school districts have been stripped of their right to rely upon the doctrine of sovereign immunity.

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[53] Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1686 (1982). Title IX prohibits sex discrimination by educational institutions which receive federal financial assistance. *Id.* § 1681.

[54] Section 504 of Title V of the Rehabilitation Act of 1973, 28 U.S.C § 794 (1982). Section 504, which is analogous to Title VI and Title IX, provides that no qualified handicapped individual can be excluded or denied the benefits of any program or activity receiving federal financial assistance solely for the reason of his handicap. *Id.* § 794. Section 504 has been utilized by plaintiffs alleging discrimination in educational programs. *See, e.g.*, Southeastern Community College v. Davis, 442 U.S. 397, 414 (1979) (plaintiff with serious hearing disability denied admission to program did not prove § 504 violation where school concluded she did not qualify for admission); Brookhart v. Illinois State Bd. of Educ., 697 F.2d 179, 184 (7th Cir. 1983) (denial of high school diplomas to certain students with disabilities because of failure to pass minimal competency test did not violate § 504); Helms v. McDaniel, 657 F.2d 800, 806 (5th Cir. 1981) (action challenging state's compliance with § 504; state review procedures found inconsistent with § 504), *cert. denied*, 455 U.S. 946 (1982).

[55] Education for All Handicapped Children Act (EHA) 20 U.S.C. §§ 1401-1461 (1982). EHA mandates certain programs and procedures if states are recipients of federal funds available under the Act. *See, e.g.*, 20 U.S.C. § 1412 (1) (1982) (Act requires states to adopt policy which assures all handicapped children free public education); 20 U.S.C. § 1412(4) (1982) (Act requires states to develop individualized program for each handicapped child).

[56] Handicapped Children's Protection Act of 1986, 20 U.S.C. § 1415 (1982). This Act amended § 615 of the Education for All Handicapped Children Act by adding a new subsection allowing suit under § 504 in addition to the remedies available under the Act, the Constitution, or other federal statutes. *Id.*

IV. LEGISLATIVE ABROGATION OF SOVEREIGN IMMUNITY

The observer who must plan for the future and has studied the effects of *Pruett* and the legislature's reaction must feel a kinship with prophets of old or, perhaps more accurately, with the prognosticator of weekend football results.

The Mississippi Legislature responded initially to the mandate of the Mississippi Supreme Court concerning sovereign immunity in 1984. Because of extensive changes which would affect the State of Mississippi and its political subdivisions, as well as municipalities and their respective agencies, the initial task confronting the legislature, and the apparent necessity of emergency action, created problems that could not be resolved satisfactorily in such a short period of time. The result was Chapter 495 of the General Laws of 1984.[57] Section 4 of the Act provided that it would apply only to claims that accrued after July 1, 1985, as to the State of Mississippi and its departments and agencies, and after October 1, 1985, as to the political subdivisions, including municipalities and school districts.[58] The Act established a maximum limit of $500,000 for all claims arising out of a single occurrence[59] and designated the State Fiscal Management Board as the administrative agency for carrying out the basic provisions of the Act, in cooperation with state and local authorities.[60] A severe criticism of the initial legislation was its failure to protect the employees of the governmental entity.

The general consensus was that the legislature was attempting to provide, without extensive and exhaustive study, a measure that could serve as a starting point for consideration by the 1985 legislature. A substantial number of school districts throughout the state felt that the Act was a problem which would disappear over a period of time and that sovereign immunity, as to the usual tort claims, would be reinstated. There was an almost unanimous feeling that the Act would be extended for at least one additional year, but with substantial modifications.

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[57] 1984 Miss. Laws ch. 495 (codified as amended at MISS. CODE ANN. §§ 11-46-1 to -21 (Supp. 1988)).

[58] *Id.* § 4 (codified as amended at MISS. CODE ANN. § 11-46-6 (Supp. 1988)).

[59] *Id.* § 9 (1) (codified as amended at MISS. CODE ANN. § 11-46-15 (Supp. 1988)).

[60] *Id.* § 11 (codified as amended at MISS. CODE ANN. § 11-46-19 (Supp. 1988)).

In 1985, the general provisions of the 1984 Act were reenacted and the effective dates were extended to July 1, 1986, and October 1, 1986, respectively.[61] In 1986, the Legislature again reenacted the general provisions of the 1984 Act and extended the dates for an additional year.[62]

By 1987, however, there was growing belief that the problem would not disappear and that workable and reasonable legislation was needed to be effective at the earliest possible date. As a result, Chapter 483 was adopted at the regular 1987 legislative session.[63] A two-year statute of limitations was reincorporated into the new Act.[64] The more important changes included in the 1987 act were: (1) protection of employees; (2) a graduated schedule for increasing maximum liability for all claims arising out of a single occurrence;[65] and (3) clarification of exceptions to liability as to certain specified claims, with the effective date for the State of Mississippi being July 1, 1988, and for political subdivisions, October 1, 1988.[66]

The 1987 Act also set forth the responsibilities of the State Fiscal Management Board and the creation of a Tort Claims Fund.[67] The State Fiscal Management Board was given the authority to contract with one or more reputable insurance consulting firms to establish a statewide plan of self-insurance and to monitor the insurance policies which might be obtained by subdivisions in lieu of joining the state plan.[68]

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[61] 1985 Miss. Laws ch. 474 (codified as amended at MISS. CODE ANN. §§ 11-46-1 to -21 (Supp. 1988)).

[62] 1986 Miss. Laws ch. 438 (codified as amended at MISS. CODE ANN. §§ 11-46-1 to -21 (Supp. 1988)).

[63] 1987 Miss. Laws ch. 483 (codified as amended at MISS. CODE ANN. §§ 11-46-1 to -21 (Supp. 1988)).

[64] *Id.* § 6 (codified as amended at MISS. CODE ANN. § 11-46-11 (Supp. 1988)).

[65] *Id.* § 8 (codified as amended at MISS. CODE ANN. § 11-46-15 (Supp. 1988)).

[66] *Id.* § 5 (codified as amended at MISS. CODE ANN. § 11-46-9 (Supp. 1988)). The most serious exposure that school districts may face with the abrogation of sovereign immunity will result from injuries to students involved in sports activities and physical education programs. Unless an exception is made to extend sovereign immunity to this type of claim, local school districts as well as state colleges and universities will have to deal with a large number of both trivial and serious claims. Administrative, settlement and/or litigation expenses in responding to all such claims will result in exorbitant and unreasonable costs.

[67] *Id.* § 9 (codified as amended at MISS. CODE ANN. § 11-46-17 (Supp. 1988)).

Although the State Fiscal Management Board began to implement its responsibilities under the Act within a reasonable time, there remained some skepticism concerning the Act's taking effect in 1988, and concerning the soundness of the program's being established by the Board. Because the Legislature believed that the program being established by the Board was not totally in place and because of financial burdens placed on state revenues to provide compliance with the law, the Act was once again extended at the 1988 Regular Legislative Session.[69]

By early 1989, the Mississippi Legislature again will be considering modification of the provisions of existing law and extension of the effective dates for an additional year. There remains considerable doubt that October 1, 1989, will mark the final demise of sovereign immunity for Mississippi school districts. The danger of continuing to extend the doctrine of sovereign immunity for the State of Mississippi and all of its subdivisions is briefly considered in the conclusion to this article.

V. STATE FISCAL MANAGEMENT BOARD

After the legislature modified and refined the laws relating to its repeal of liability immunity in 1987, the State Fiscal Management Board began to perfect its programs as authorized and mandated by the legislature. The insurance division of the State Fiscal Management Board tentatively established two specific funds. The State of Mississippi and its governmental entities, other than political subdivisions, would constitute one separate and independent pool with the funds to be allocated by the legislature for administrative and claims expense.[70] A second pool would be established for all political subdivisions which might desire to participate in a comprehensive plan of self-insurance.[71]

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[68] *Id.* § 10 (codified as amended at MISS. CODE ANN. § 11-46-19 (1)(a) (Supp. 1988)).

[69] 1988 Miss. Laws. ch. 442 (codified as amended at MISS. CODE ANN. § 11-46-7 (Supp. 1988)).

[70] MISS. CODE ANN. § 11-46-17(2) (Supp. 1988).

[71] *Id.* § 11-46-17(3) & (4).

Since this article deals with school districts, this section will be limited to what various school districts might expect under the administration of the Act by the State Fiscal Management Board.

In the late spring of 1988 the insurance agent of record, the assistant superintendent for fiscal affairs, the financial officer, and the attorney for the Gulfport District conferred with a representative of the State Fiscal Management Board.[72] At that time the legislature had not completed fully its revision of the various sections dealing with immunity from liability, although no major changes were anticipated. The Gulfport District was assured that the self-insurance program to be administered by the State Fiscal Management Board would substantially cover all risks which the school district might face under the new law anticipated to be effective October 1, 1988.[73]

Provided that all or a substantial number of school districts participated in the self-insurance program, the projected cost to each school district within the state would be calculated at $2.45 per student. That rate would be committed firmly for two years, after which there could be a reexamination and an increase in the premium charged. If fewer districts participated, then the cost per student might be increased by twenty-five percent, or $.62 per student. Thus, it was very simple for each school district to estimate its immediate cost under this program.[74]

The law also provided that a school district could meet the statutory requirements by securing protection of one or more liability insurance policies to be approved by the State Fiscal Management Board.[75] Section 11-46-17 of the act, as amended by the legislature in 1988, provided that:

> Such plan shall provide coverage to each such governmental entities for *every risk* for which the board [State Fiscal Management Board] determines the respective governmental entities to be liable in the event of a claim or suit for injuries

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[72] Confidential Memorandum from Owen T. Palmer, Jr. (March 7, 1988).

[73] *Id.*

[74] *Id.* School boards will face costs additional to the self-insurance program. Upon the effective date of the waiver of immunity, school districts must also provide workers' compensation coverage for their employees. Miss. Code Ann. § 71-3-5 (1972).

[75] Miss. Code Ann. § 11-46-17 (Supp. 1988).

> under the provisions of this chapter, including claims or suits for injuries from the use or operation of motor vehicles; provided, however, that the Fiscal Management Board may allow such plan to contain any reasonable limitations or exclusions not contrary to Mississippi state statutes or case law as are normally included in commercial liability insurance policies generally available to governmental entities. In addition to the coverage authorized in the preceding sentence, the plan may provide coverage for liabilities outside the provisions of this chapter, including but not limited to liabilities arising from Sections 1983 through 1987 of Title 42 of the United States code and liabilities from actions brought in foreign jurisdictions, and the board shall establish limits of coverage for such liabilities.[76]

The Gulfport District was assured in the spring of 1988 that, subject to the limitations contained in the Act, school districts would be protected from the risks of hazardous materials, pollution claims, liability for acts prohibited by section 1983, and certain other risks not covered by the usual commercial insurance policies.[77] During the conference in the spring of 1988 and at the seminar of the Mississippi Council of School Board Attorneys in October, 1988, assurance was given that in the event the limits of liability were not honored by the courts, after proper appeal to the Mississippi Supreme Court, school districts would be protected as to any excess judgment which might be affirmed. A concern was voiced that the $25,000 maximum liability limit for all claims arising out of a single occurrence during the first year of the Act appeared to be unreasonably low and was, as a matter of fact, only fifty percent of the protection afforded under the Accident Contingency Fund Act.[78] In view of the uncertainties as to potential liability facing school districts unprotected by self-insurance programs with the State Fiscal Management Board, a valuable addition to the plan would be a type of umbrella coverage in excess of and secondary to coverages furnished.

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[76] *Id.* (emphasis added).

[77] *See supra* note 72. At the annual seminar of the Mississippi Council of School Board Attorneys in October, 1988, a representative of the State Fiscal Management Board was not as unequivocable in his assurances of such coverage.

[78] *Id.*

There is a serious question as to how many of the 153 school districts truly understand the risks anticipated when the shield of limited sovereign immunity is no longer available and exposure to risks for which districts have no adequate insurance or other protection is realized. The Mississippi School Boards Association and the Mississippi Council of School Board Attorneys have held several seminars in recent years with limited program segments focusing on the mandate of *Pruett* and the legislation which has ensued. If the legislature in 1989 fails to extend the doctrine of sovereign immunity for an additional year, it is imperative for school districts wanting to maintain their financial integrity to join together in a mandatory in-depth conference to assure that they will be protected through adequate insurance coverage under either the State Fiscal Management Board plan, commercial insurance policies, or a combination of both.

VI. Conclusion

The possibility or, perhaps probability, exists that sovereign immunity for school districts will be extended for one or more years after October 1, 1989. The basis for this feeling is that additional time is required to increase the reserve necessary to finance the plan for the state and its principal agencies and for the State Fiscal Management Board to prepare a workable plan for both the state and its political subdivisions.

Pursuant to section 11-46-19 of the Mississippi Code, the State Fiscal Management Board already has contracted with an insurance consulting firm to administer the processing and settlement of claims, plus any necessary legal defense. To date, details regarding the local adjusters and attorneys required to handle claims and litigation apparently have not been resolved.

October 1, 1989, will mark the seven-year anniversary of the *Pruett* decision. Judge Bowling, writing for an *en banc* court in *Pruett*, expressed with clarity the problem of continuing the absolute sovereign immunity doctrine. A few of his statements even more pertinent today than they were in 1982, conclude that:

> [w]e could continue and give many examples of why the abso-

> lute sovereign immunity doctrine is out of date in modern society and modern legal concepts. The inequity of the situation is articulated by examining our safety responsibility law which requires insurance coverage of all vehicles operated by persons, firms, co-partnerships, associations, etc., but expressly provides that such requirements do not apply with respect to any motor vehicle owned by the State of Mississippi or any subdivision of this state. The injustice of this legal prohibition as explained in the above set out example is obvious.[79]

Pruett is replete with similar and even stronger condemnations of the failure of the State of Mississippi to address realistically this problem. Is it inconceivable that, if the *Pruett* mandate continues to be ignored after seven to ten years and suit is filed on behalf of a child killed or seriously injured as a result of the negligence of school employees, that a circuit court judge might permit the evidence to go to the jury and that a substantial judgment could be rendered? Can the school district then depend upon the Supreme Court of Mississippi to respond with additional time to implement *Pruett*? The problems posed in those questions must be resolved before a school district discovers that the legislature has acted too little, too late.

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[79] *Pruett*, 421 So. 2d at 1047. The Court in *Pruett* cited numerous opinions from across the country reinforcing its view that sovereign cimmunity was dated. For example, the court, cited an opinion from New Mexico with approval:

> Likewise, we agree with the Supreme Court of Florida that in preserving the sovereign immunity theory, courts have overlooked the fact that the Revolutionary War was fought to abolish that "divine right of Kings" on which the theory is based.

Id. (quoting Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 21-22, 163 N.E.2d 89, 94 (1959)).

Further indicating its disdain for sovereign immunity, the *Pruett* court quoted a Kansas decision:

> . . . [t]he doctrine of governmental immunity is an historical anachronism which manifests an inefficient public policy and works injustice upon everyone concerned.

Pruett, 421 So. 2d at 1050 (quoting Brown v. Wichita State Univ., 217 Kan. 279, 540 P.2d 66 (1975)).

APPENDIX I

STATE	IMMUNITY WAIVED FOR SIMPLE NEGLIGENCE	IMMUNITY WAIVER FOR GROSS NEGLIGENCE
AL		
AK	X	X
AZ		X(17,18)
AR	X(1)	X(1)
CA	X	X
CO	X(2,5,7)	X(2,5,7)
CT	X	X
DE		X
DC		X
FL	X	X
GA		
HI	X	X
ID	X	X
IL	X	X
IN		X(4)
IA	X	X
KA	X	X
KY	X(9,13)	X(9,13)
LA	X	X
ME	X(5,6,7)	X(5,6,7)
MD	X(2,13)	X
MA	X	X
MI	X(5,7)	X(5,7)
MN	X	X
MS	X(10/1/88)	X(10/1/88)
MO	X(5,6,7)	X(5,6,7)
MT	X	X
NE	X	X
NV	X	X
NH	X(5,7)	X(5,7)
NJ	X(7,9)	X(7,9)
NM	X(5,6,7)	X(5,6,7)
NY	X(5)	X(5)

STATE	IMMUNITY WAIVED FOR SIMPLE NEGLIGENCE	IMMUNITY WAIVER FOR GROSS NEGLIGENCE
NC	X(2)	X
ND	X	X
OH	X(5,8)	X(5,8)
OK	X	X
OR	X	X
PA	X(5,7,19)	X(5,7,19)
RI	X	X
SC	X	X
SD		
TN	X(5,7,9)	X(5,7,9,10)
TX	X(5,11)	X(4,5,11,12)
UT	X(5,7,9,15,16)	X(5,7,9,15,16)
VT	X(2)	X(2)
VA	X(13)	X(13)
WA	X	X
WV	X(5,7,9)	X(5,7,9)
WI	X	X
WY	X(5,7)	X(5,7)

STATUTORY CITATIONS

Alaska Stat. § 9.05.250 (1985)

Ariz. Rev. Stat. Ann. § 12-820.01 (Supp. 1987)

Ark. Stat. § 80-1811 (1975) (school district not liable, just driver or operator of a school bus)

Cal. Govt. Code § 945 (1978)

Colo. Rev. Stat. §§ 24-10-104.-106 (1984)

Conn. Gen. Stat. §§ 10-212a. 52-557b(b) (1985)

Del. Code Ann. tit. 10. § 4001(3) (1987)

D.C. Code Ann. § 6-1012 (1981)

Fla. Stat. Ann. § 768.28(1). (5) (1977)

Haw. Rev. Stat. § 662-2 (1978)

Idaho Code § 6-903(a) (1981 & Supp. 1987)

Ill. Rev. Stat. Ch. 122 §§ 821-31 (1962 & Supp. 1988) (sovereign immunity of school districts waived by *Moiltor v. Kaneland Community Dist. No. 302.* 18 Ill.2d 11, 163 N.E.2d 89 (1959),

cert. denied, 362 U.S. 968 (1960).
Ind. Code Ann. § 34-4-16.5-3.5 (1986 & Supp. 1987)
Iowa Code §§ 613A.2, 613A.4 (1985)
Kan. Stat. Ann. § 75-6101 (1983 & Supp. 1987)
Ky. Rev. Stat. Ann. § 44.072 (Supp. 1986)
La. Const. art. 12, § 10(A) (1977)
Me. Rev. Stat. Ann. tit. 14. § 8104 (1984)
Md. State Govt. Code Ann. §§ 12-103,-104 (1984 & Supp. 1987)
Mass. Gen. Laws Ann. ch. 258 § 2 (Supp. 1988)
Mich. Comp. Laws §§ 691.1405. .1406 (1982 & Supp. 1987)
Minn. Stat. Ann. § 466.02 (1984)
Miss. Code Ann. § 11-46-5(1) (Supp. 1987)
Mo. Rev. Stat. § 537.600 (1987)
Mont. Code Ann. § 2-9-102 (1983)
Neb. Rev. Stat. § 23-2407 (1985)
Nev. Rev. Stat. § 41.031 (1987)
N.H. Rev. Stat. Ann. § 507-B:2 (1983)
N.J. Stat. Ann. §§ 59:2-2, 59:3-1, 59-4-2 (1983)
N.M. Stat. Ann. § 41-4-4 to -4-6 (1978)
N.Y. Gen. Mun. Code § 50-6 (1986)
N.C. Gen. Stat. § 115C-42 (1987)
N.D. Cent. Code § 32-12.1-03(1) (1981)
Ohio Rev. Code Ann. § 2744.02(A), (B)(1), (2) (1988)
Okla. Stat. Ann. tit. 51, §§ 153, 155 (1984)
Or. Rev. Stat. § 30.265 (1987)
Pa. Stat. Ann. tit. 42. § 8542 (1982)
R.I. Gen. Laws § 9-31-1 (Supp. 1983)
S.C. Code Ann. §§ 15-78-20 to -60 (Supp. 1987)
Tenn. Code Ann. §§ 29-20-201 to -205 (1980)
Tex. Educ. Code Ann. §§ 21.912(b) .914 (1987); Tex. Civ. Prac. & Rem. Code § 101.021, .051 (1986)
Utah Code Ann. §§ 63-30-5 to -10 (1986)
Vt. Stat. Ann. tit. 29, § 1403 (1986)
Va. Code Ann. § 8.01-195.3 (1984 & Supp. 1988)
Wash. Rev. Code Ann. § 4.96.010 (Supp. 1988)
W. Va. Code § 29-12A-4 (1986)

Wis. Stat. Ann. § 893.80 (1983) (Legislative Council Report notes judicial waiver of immunity from which statute draws some of its content)

Wyo. Stat. §§ 1-39-105, -106 (1987)

FOOTNOTES

[1] only for school bus drivers and operators
[2] only to the extent of insurance
[3] only in execution or enforcement of laws
[4] only in administering medication to students
[5] only for operation of motor vehicle
[6] only for machinery, furnishings
[7] only for construction, operation and/or maintenance of public buildings or other property, thoroughfares
[8] only for proprietary functions
[9] only for negligence of employees
[10] only for gross negligence of board members
[11] only when bodily injury caused to students
[12] only for gross negligence when disciplining students
[13] only as to state liability, not local governmental entities
[14] only when rendering emergency first aid
[15] only as to contractual obligations
[16] only as to property actions
[17] only as to issuance or failure to revoke any permit, license, certificate, approval, etc.
[18] only as to failure to discover violations of inspection laws applicable to property other than property owned by the public entity
[19] only as to trees, traffic controls, street lighting, utility services, animals

APPENDIX II

Chapter 354 STATE OF MISSISSIPPI, 1982

SECTION 15. Section 37-41-41, Mississippi Code of 1972, is amended as follows:

37-41-41. Compensation on any claim shall be disbursed to such county or municipal separate school district or special municipal separate school district or junior college district or consolidated school district from the Accident Contingent Fund to cover any accident arising as provided in Section 37-41-37, upon the receipt of a certified copy by the circuit clerk of any judgment rendered in such cases, in the event that the same are concluded by litigation, or upon the receipt of a certificate from the chancery clerk of such county or of a properly executed release with bills attached from the superintendent or president as provided in said section, in the event that any such claim or claims shall be settled by way of compromise without litigation. No such claim shall be paid from any fund other than the Accident Contingent Fund.

No such claim arising from such accident shall exceed the total amount of Ten Thousand Dollars ($10,000.00) exclusive of court costs for any one (1) person sustaining such injuries or damages, and no more than Fifty Thousand Dollars ($50,000.00) shall be paid in any one (1) accident. When it appears that claims in more than the amount of Fifty Thousand Dollars ($50,000.00) will be made because of one (1) accident, the chancellor either in court term or vacation shall prorate said claims as in his opinion are just and equitable.

No claim for property damage shall be paid in excess of One Thousand Dollars ($1,000.00) per claimant per accident. When no claim is made for personal injuries by way of suit, hospital, medical and doctor bills may be paid in a sum not to exceed One Thousand Dollars ($1,000.00) per person per accident.

APPENDIX III

§ 11-46-11. **Statute of limitations; notice of claim requirements.**

(1) Any person having a claim for injury arising under the provisions of this chapter against a governmental entity or its employee shall proceed as he might in any action at law or in equity; provided however, that ninety (90) days prior to maintaining an action thereon, such person shall file a notice of claim with the chief executive officer of the governmental entity, and, if the governmental entity is participating in a plan administered by the board pursuant to Section 11-46-7(3), such chief executive officer shall notify the board of any claims filed within five (5) days after the receipt thereof.

(2) The notice of claim required by subsection (1) of this section shall be in writing, delivered in person or by registered or certified United States mail. Every notice of claim shall contain a short and plain statement of the facts upon which the claim is based, including the circumstances which brought about the injury, the extent of the injury, the time and place the injury occurred, the names of all persons known to be involved, the amount of money damages sought and the residence of the person making the claim at the time of the injury and at the time of filing the notice.

(3) All actions brought under the provisions of this chapter shall be commenced within two (2) years next after the cause of such action accrued, and not after; provided, however, that the filing of a notice of claim as required by subsection (1) of this section shall serve to toll the statute of limitations for a period of ninety-five (95) days.

SOURCES: Laws, 1984, ch. 495, § 7; reenacted without change, Laws 1985, ch. 474, § 6; 1987, ch. 483, § 6; 1988, ch. 479, § 3, eff from and after July 1, 1988.

Editors Note—

Section 50, Laws, 1987, ch. 483, provides as follows:

"Section 4, Chapter 495, Laws of 1984, as reenacted and amended by Section 12, Chapter 474. Laws of 1985, as amended by Section 6, Chapter 438, Laws of 1986, which specifies the causes of action that are covered by Chapter 46, Title 11, Mississippi Code of 1972, and specifies the law that

governs causes of action that occur prior to the effective date of coverage of Chapter 46, Title 11, Mississippi Code of 1972, is hereby repealed."

Research and Practice References—

1984 Mississippi Supreme Court Review: Civil Procedure. 55 Miss. LJ 49, March, 1985.

§ 11-46-13. Jurisdiction; appeals; venue.

(1) Jurisdiction for any suit filed under the provisions of this chapter shall be in the court having original or concurrent jurisdiction over a cause of action upon which the claim is based. Appeals may be taken in the manner provided by law.

(2) The venue for any suit filed under the provisions of this chapter against the state or its employees shall be in the county in which the cause of action arose, or in Hinds County. The venue for all other suits filed under the provisions of this chapter shall be in the county in which the principal offices of the governing body of the political subdivision are located.

SOURCES: Laws, 1984, ch. 495, § 8; reenacted without change, Laws 1985, ch. 474, § 7; 1987, ch. 483, § 7, eff from and after passage (approved April 15, 1987).

Editor's Note—

Section 50, Laws, 1987, ch. 483, provides as follows:

"Section 4, Chapter 495, Laws of 1984, as reenacted and amended by Section 12, Chapter 474, Laws of 1985, as amended by Section 6, Chaper 438, Laws of 1986, which specifies the causes of action that are covered by Chapter 46, Title 11, Mississippi Code of 1972, and specifies the law that governs causes of action that occur prior to the effective date of coverage of Chapter 46, Title 11, Mississippi Code of 1972, is hereby repealed."

§ 11-46-15. Limitation of liability; exemplary or punitive damages; interest; attorney's fees; reduction of award.

(1) In any claim or suit for damages against a governmental entity or its employee brought under the provisions of this chapter, the liability shall not exceed the following for all claims arising out of a single occurence for all damages permitted under this chapter:

(a) For claims or causes of action arising from acts or omissions occurring on or after July 1, 1989, but before July 1, 1990, the sum of Twenty-five Thousand Dollars ($25,000.00);

(b) For claims or causes of action arising from acts or omissions occurring on or after July 1, 1990, but before July 1, 1991, the sum of Two Hundred Thousand Dollars ($200,000.000);

(c) For claims or causes of action arising from acts or omissions occuring on or after July 1, 1991, the sum of Five Hundred Thousand Dollars (500,000.00).

(2) No judgment against a governmental entity or its employee for any act or omission for which immunity is waived under this chapter shall include an award for exemplary or punitive damages or for interest prior to judgment, or an award of attorney's fees unless attorney's fees are specifically authorized by law.

(3) Except as otherwise provided in Section 11-46-17(4), in any suit brought under the provisions of this chapter, if the verdict which is returned, when added to costs and any attorney's fees authorized by law, would exceed the maximum dollar amount of liability provided in subsection (1) of this section, the court shall reduce the verdict accordingly and enter judgment in an amount not to exceed the maximum dollar amount of liability provided in subsection (1) of this section.

SOURCES: Laws, 1984, ch. 495, § 9; reenacted without change, Laws 1985, ch. 474, § 8; 1987, ch. 483, § 8; 1988, ch. 442, § 5, eff from and after passage (approved April 25, 1988).

Editor's Note—

Section 50, Laws, 1987, ch. 483, provides as follows:

"Section 4, Chapter 495, Laws of 1984, as reenacted and amended by Section 12, Chapter 474, Laws of 1985, as amended by Section 6, Chapter 438, Laws of 1986, which specifies the causes of action that are covered by Chapter 46, Title 11, Mississippi Code of 1972, and specifies the law that governs causes of action that occur prior to the effective date of coverage of Chapter 46, Title 11, Mississippi Code of 1972, is hereby repealed."

Cross references—

As to definition of "employee," see § 11-46-1.

As to waiver of immunity, see § 11-46-5.

As to provisions relative to insurance coverage in excess of the maximum liability set forth in this section and waiver of such maximum, see § 11-46-17.

Research and Practice References—

1984 Mississippi Supreme Court Review: Civil Procedure. 55 Miss LJ 49, March, 1985.

THE LEGAL STATUS OF FUNCTIONAL LITERACY EXAMINATIONS

*Robert J. Beebe**

A key development in the national movement to reform public education has been the establishment of state testing programs designed to measure the achievement of those reform goals.[1] One such program — the functional literacy examination or the student minimum competency examination — is the focus of this article. Such testing has long been a controversial subject among those in the education profession.[2] A long-awaited decision concerning the functional literacy testing was reached by the United States Court of Appeals for the Eleventh Circuit in *Debra P. v. Turlington*.[3] The United States District Court for the Southern District of Georgia also ruled on this question in *Anderson v. Banks*.[4] Commentators have viewed the relevant legal issues from a variety of perspectives.[5] Therefore, an assessment of the legal status of functional literacy examinations appears appropriate.

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[1] T. Sergiovanni, M. Burlingame, F. Coombs, & P. Thurston, Educational Governance and Administration 22-24 (2d ed. 1987).

[2] *See* Logar, *Minimum Competency Testing in Schools: Legislative Action and Judicial Review*, 13 J. L. & Educ. 35, 35-38 (1984)(arguments for and against competency testing); McClung, *Competency Testing Programs: Legal and Educational Issues*, 47 Fordham L. Rev. 651, 665-72 (1979)(discussion of educational debate over testing standards).

[3] 644 F.2d 397 (5th Cir.), *reh'g denied*, 654 F.2d 1079 (5th Cir. 1981)(en banc), *remanded*, 564 F. Supp. 177 (M.D. Fla. 1983), *aff'd*, 730 F.2d 1405 (11th Cir. 1984).

[4] 540 F. Supp. 761 (S.D. Ga. 1982). Two cases, Brookhart v. Illinois State Bd. of Educ., 534 F. Supp. 725 (D. Ill.1982), and Board of Educ. v. Ambach, 457 N.E.2d 775, 469 N.Y.S.2d 669 (Ct. App. 1983), have reviewed functional literacy examination requirements as applied to handicapped students. Because of the special facts of instructional programming for the handicapped, these cases have been judged inapplicable to the present discussion.

[5] *See supra* note 2 and accompanying text.

By 1984, thirty-seven states had enacted legislation requiring the administration of functional literacy examinations, with seventeen requiring a passing score on the test as a prerequisite for high school graduation.[6] No state at present has rescinded these requirements[7]. This article reviews the relevant case law to date and discusses the legal issues that remain unresolved. The importance of this article will be evident to those officials enforcing functional literacy examination requirements and needing to understand the legal vulnerability of such tests as well as to those who are critical of functional literacy examinations and are searching for tools with which to raise new legal challenges to such programs. The author's hope is to encourage the continual examination of functional literacy examinations.

I. *Debra P. v. Turlington*

In 1978, the Florida legislature amended the Educational Accountability Act of 1976 requiring that all Florida public school students pass a functional literacy examination — the State Student Assessment Test, Part II (SSAT-II) — in order to receive a state high school diploma.[8] Debra P. filed a class action against state officials implementing this requirement seeking to represent all present and future twelfth grade students in the state who had failed or would fail the SSAT-II, all similarly situated black students in the state, and all similarly situated black students in her school district. The suit challenged the SSAT-II requirement as a violation of the due process and equal protection clauses of the fourteenth amendment, Title VI of the Civil Rights Act of 1964, and the Equal Educational Opportunities

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[6] Silas, *Testing the Tests: Can Diplomas Be Withheld*? 70 A.B.A. J. 29, 29 (1984).

[7] *See* Logar, *supra* note 2, at 39 & nn.13, 15-16 (thirty-seven states are Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming).

[8] 730 F.2d 1405, 1406 (11th Cir. 1984). *See also* FLA. STAT. ANN. § 229.57 (West 1989)(most recent version of challenged statute).

Act of 1976.[9] A key allegation in the suit centered around the fact that the testing requirement had a disproportionate impact on black students. At the time suit was filed, the failure rate of black students for Fall 1977, Fall 1978, and Spring 1979, was approximately ten times that of white students.[10]

In addition to the allegations that the test was racially biased in violation of the fourteenth amendment's equal protection clause, Title VI, and the Equal Educational Opportunities Act, the plaintiff alleged that the awarding of diplomas under the new SSAT-II provision without providing adequate notice of the new requirement or adequate time to prepare for the required examination deprived the plaintiffs of due process under the fourteenth amendment. Additionally, the plaintiff alleged that the SSAT-II was a mechanism for resegregating the Florida schools through the assignment to remedial classes of those students failing the examination.[11] Debra P. sought a declaratory judgment that the SSAT-II requirement as a prerequisite to receiving a state high school diploma was constitutionally and statutorily invalid, an injunction restraining the use of the test results in awarding school diplomas, an injunction to purge the plaintiffs' scholastic records of any notation of SSAT-II failure, and an order to prohibit the use of SSAT-II results as a means of structuring remedial classes.[12]

On the equal protection and statutory claims, the trial court found the testing program invalid since its implementation perpetuated the harmful effects of the segregated, unequal, and inferior education received by the black plaintiffs before school desegregation.[13] The court, however, held that the SSAT-II was not itself arbitrary, unreasonable, or without a rational relation to the valid state purpose of distinguishing between "functionally literate" and "functionally illiterate" high school students.[14] In addition, the test was held to possess content and construct validity, and not to contain racially or ethnically biased test items.[15] Furthermore, the trial court also found a due process violation in that the two-month time period provided for implementation of the SSAT-II program failed to give adequate notice of the new testing requirement and an adequate opportunity for the plaintiffs to prepare for the test.[16] The SSAT-II program was held to have deprived the students of a property right to graduate from high school despite the fact that they had fulfilled all previous requirements for the high school diploma.[17] In addition, the court held that instruction in the years prior to SSAT-II's implementation had not taken into account the specific objectives tested by the SSAT-II or its accompanying sanction.[18] Thus, the students were held to have been deprived of the protectable liberty interest of being free of the stigma associated with the denial of a high school diploma and its economic and psychological consequences.[19]

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[9] *Debra P.*, 730 F.2d at 1406. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-2000d-6 (1976), prohibits discrimination on the basis of race, color, or national origin under federally assisted programs. *Id.* § 2000d. The Equal Educational Opportunities Act, 20 U.S.C. § 1703 (1976), prohibits the denial of equal educational opportunity on the basis of race, color, sex, or national origin. *Id.* § 1703.

[10] *Debra P.*, 730 F.2d at 1406.

[11] Debra P. v. Turlington, 474 F.Supp. 244, 246-27 (M.D. Fla. 1979).

[12] *Id.* at 247.

[13] *Id.* at 256-27. On the question of intent to discriminate, the court found the proof of present intent insufficient, but stated that the past purposeful discrimination was perpetuated by the test and the diploma sanction regardless of its neutrality. *Id.* at 254-55.

However, the trial court found that the remedial classes for students who failed the SSAT-II provided improved educational opportunities for a period no longer than necessary to compensate for the students' identified deficiencies and was not, therefore, impermissible.[20] The court, therefore, enjoined the state for a period of four years from requiring a passing score on the SSAT-II as a requirement for graduation.[21] After this period, the state would have had ". . . the necessary period of time to orient the students and teachers to the new functional literacy objectives, to insure instruction in the objectives, and to eliminate the taint on educational development which accompanied segregation . . . ."[22] The court did, however, permit the state to continue to use SSAT-II scores and its remedial program in order to correct the deficiencies of those students who failed the test.[23]

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[14] *Id.* at 260-61. The court recognized that the test did not equal every definition of functional literacy, but that it did match the one given by the Florida Department of Education and the State Board of Education, as well as satisfying the Florida legislature. *Id.* Thus, the test was rationally related to a valid state interest. *Id.* at 261.

[15] *Id.* at 261-62. The court was satisfied that the skill objectives of the test were adequately evaluated by the test items and that the test had adequate content validity in addition to adequate construct validity. *Id.* at 261. The court, however, was not convinced by the plaintiffs' evidence that the test or any test item should be invalidated for racial or ethnic bias. *Id.* at 262.

[16] *Id.* at 267. The court stated that the plaintiffs, after spending ten years in schools which compelled their attendance, were informed of a requirement concerning skills which, if taught, should have been taught in grades they had long since completed. *Id.*

[17] *Id.* at 266.

[18] *Id.* at 264. Since instruction in the skills necessary to successfully complete the functional literacy test was a cumulative and time consuming process, the court found that it was critical that at the time of instruction the student knew that the individual skill he was being taught had to be learned prior to his graduation from school. *Id.*

[19] *Id.* at 266. The stigma associated with failure of the competency test was very real, according to the court, and would affect the economic and psychological development of the individual. *Id.*

On appeal, the United States Court of Appeals for the Fifth Circuit reviewed the constitutional and statutory validity of reimplementation of the diploma sanction after the four-year suspension period. The Fifth Circuit remanded the case for further findings of fact on the question of whether the SSAT-II covered material not taught to students since there was no evidence in the record that the state had made any effort to establish this question, a central matter in insuring the curricular validity of the SSAT-II.[24] The court stated, "[I]f the test covers material not taught the students, it is unfair and violates the Equal Protection and Due Process clauses of the United States Constitution."[25] The Fifth Circuit ordered the trial court, if it found that the test was fair, to reexamine and clarify "the role and effect of the 'vestiges' of past discrimination" upon the performance of black students, to furnish a guide in the fashioning of an appropriate remedy.[26]

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[20] *Id.* at 268. Even though the compensatory education program constituted only two classes or hours per day at most, due to the disproportionately large black composition of participants, the court warned defendants to be constantly wary to prevent the test and subsequent remedial classes from isolating and stigmatizing any children for longer than was necessary to compensate for the identified deficits. *Id.*

[21] *Id.* at 269.

[22] *Id.*

[23] *Id.* This practice would be consistent with the manner in which the state retained other achievement test scores. *Id.*

[24] Debra P. v. Turlington, 644 F.2d 397, 405-06 (5th Cir. 1981).

[25] *Id.* at 402.

[26] *Id.* at 408 n.19. The Fifth Circuit denied a subsequent petition for rehearing.

On remand, the United States District Court for the Middle District of Florida heard evidence on the curricular validity of the SSAT-II to determine whether the examination tested material actually taught to the students and to ascertain the effect of the vestiges of past discrimination upon black students' performance.[27] As a part of this evidentiary hearing, a four-part study was carried out. The first part of the study involved a survey of all teachers in Florida as to whether they had provided instruction relating to the skills tested on the SSAT-II, and if so, whether they had provided instruction sufficient for a student to master those skills.[28]

Secondly, a survey was sent to all 67 school districts and four laboratory schools in the state asking for an estimate of the grade level at which students received preparation in the SSAT-II skills and the grade level at which the majority of students would have mastered the skills. This survey also sought information concerning any major instructional variations among schools, any remedial programs relating to mastery of SSAT-II skills, any staff development programs used to promote such mastery, instructional materials that specifically prepared students for any of the SSAT-II skills, and programs directed toward helping students pass the SSAT-II.[29] Thirdly, a series of site visits was conducted in order to verify the accuracy of the district and school reports.[30] And lastly, a student survey administered by the site visitors to one or two eleventh-grade social studies and English classes asked the students whether or not they had been taught in school how to answer questions on the SSAT-II skills.[31]

This information plus the testimony of five expert witnesses led the court to find the SSAT-II curricularly valid. The court declined to require additional proof that the individual plaintiffs had actually been taught the SSAT-II skills.[32] The court was im-

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Debra P. v. Turlington, 654 F.2d 1079 (5th Cir. 1981).

[27] Debra P. v. Turlington, 564 F. Supp. 177, 179 (M.D. Fla. 1983).

[28] *Id.* at 180.

[29] *Id.* at 180-81.

[30] *Id.* at 181.

[31] *Id.*

[32] *Id.* at 181-84.

pressed by the fact that students were given five opportunities to pass the SSAT-II between the tenth and twelfth grades, and that remedial help was available in the event of failure.[33]

On the issue of past discrimination, the court was asked to assess the constitutional impact of the remaining effects of racial segregation of schools. Based on the testimony of three witnesses, the court found "no causal link between the disproportionate failure rate [of black students] and the present effects of past school segregation. Moreover, even if there was a causal connection, the defendants [had] carried their burden of showing that the SSAT-II is necessary to remedy those effects."[34] For these reasons, the court declined to extend the injunction suspending the use of the SSAT-II beyond the initial four-year period.[35]

The United States Court of Appeals for the Eleventh Circuit reviewed the findings of the district court finding nothing clearly erroneous. On the issue of curricular validity, the court found no legal requirement for direct evidence of what students were actually taught, no necessity for evidence of what had been taught in Florida schools every year since 1971, and no reason not to admit the studies used to validate the SSAT-II.[36] On the past discrimination issue, the court found the fact that 91 to 99 percent of black students passed the test to be strong evidence that the vestiges of past discrimination did not cause blacks to fail the test.[37] Thus, the court affirmed the findings of the district court holding that the State of Florida could deny diplomas to students who had not passed the SSAT-II after the expiration of the four-year period.[38]

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[33] *Id.* at 185.

[34] *Id.* at 188.

[35] *Id.* at 189. The court stated that the use of the SSAT-II could be enjoined only if it perpetuated the effects of past school segregation or if it was not needed to remedy those effects. *Id.* Since the State of Florida had undertaken massive efforts to improve the education of its school children, the court justified its decision not to extend the injunction. *Id.*

[36] Debra P. v. Turlington, 730 F.2d 1405, 1409-14 (11th Cir. 1984).

[37] *Id.* at 1414-16.

[38] *Id.* at 1416-17.

II. *Anderson v. Banks*

Anderson v. Banks[39] examined the validity of a local school district policy that required, as a condition to the awarding of a high school diploma, passing mathematics and reading scores on the California Achievement Test (CAT).[40] The plaintiffs, students who were scheduled to graduate from high school, requested that the school board rescind or not enforce the school district's diploma sanction.[41] After a hearing, the school board denied the request and was affirmed by the State Board of Education. The plaintiffs then appealed to the Superior Court of Tattnal County, which affirmed the State Board of Education's decision.[42] On appeal to the Georgia Court of Appeals, the court considered whether the local board exceeded its statutory authority by imposing a requirement for graduation beyond the requirements established by the State Board of Education. Additionally, the court addressed the issue of whether the application of the diploma sanction denied plaintiffs due process because of insufficient notice, and due to the policy's being applied locally rather than statewide, whether it denied plaintiffs equal protection.[43]

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[39] 520 F. Supp. 772 (S.D. Ga. 1981), *on reh'g*, 540 F. Supp. 761 (S.D. Ga. 1982), *appeal dismissed sub nom.* Johnson v. Sikes, 730 F.2d 644 (11th Cir. 1984).

[40] *Anderson*, 540 F. Supp. at 762. Plaintiffs argued that the California Achievement Test (CAT) was not a fair test of the material actually taught in Tattnal County public schools. *Id.* at 762-65,. Their expert, Dr. Robert Calfee, criticized the curriculum match as failing to take account of aspects such as readability, passage type and question complexity. *Id.* at 762. Additionally, plaintiffs alleged that students had not been taught parts of the curriculum. *Id.* at 763. A final argument was that students making the largest gains on the CAT during high school years were those who scored the lowest on entry to high school. *Id.* at 764. The court denied this argument stating that the increased performance was a tribute to the Tattnal County program. *Id.*

[41] Wells v. Banks, 266 S.E.2d 270 (Ga. Ct. App. 1980). The first suit challenging the CAT requirement, styled Wells v. Banks, began in the Georgia courts. Claims initially were raised in an administrative proceeding which progressed from the local school board, to the State Board of Education, and ultimately to the Georgia Court of Appeals. This suit, still styled Wells v. Banks, was also filed in the United States District Court for the Southern District of Georgia. *Wells* asserted due process, equal protection, and state law claims. While the case was pending in the federal district court, the authority of the school board to require the examination was upheld in the Georgia court system. The Georgia courts also found no equal protection violation in the fact that the requirement was applied in one county only rather than statewide. There were no black plaintiffs remaining in the suit in the federal district court at the time of trial. The case was restyled Anderson v. Banks. In addition, the suit styled Johnson v. Sikes was consolidated with the *Anderson* suit. *See* Anderson v. Banks, 520 F. Supp. 472, 476-77 (S.D. Ga. 1981)(outlining history of suit).

[42] *Wells*, 266 S.E.2d at 271. The achievement test was designed to determine whether or not a student who had otherwise qualified to graduate possessed the skills in math and reading expected of a student entering the ninth grade. *Id.*

In addressing the first issue, the court found no statutory support for the plaintiffs' argument, construing the applicable language to hold that the school board had not exceeded its authority. With regard to the due process claim, the court found the two-year notice provision adequate. The court found no necessity that all school boards control the quality of public education in the same way.[44]

In a consolidated action to resolve several similar challenges to the use of the CAT as a high school exit requirement, the United States District Court for the Southern District of Georgia addressed five claims pertinent to functional literacy examinations.[45] The plaintiffs alleged: 1) that the diploma policy, because of its disproportionate impact on black students, discriminated on the basis of race in violation of the fourteenth amendment's equal protection clause; 2) that the diploma requirement violated the equal protection clause when applied to black students who had attended racially segregated schools; 3) that the diploma sanction, if found violative of the equal protection clause, also violated Title VI and the Equal Educational Opportunities Act; 4) that the two-year provision of the revised requirement did not provide failing students with sufficient due process of law under the fourteenth amendment; and 5) that the diploma sanction violated the students' right to due process of law because it had not been established that the items on the test were actually taught in the schools.[46]

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[43] *Id.* at 271-72.

[44] *Id.* The court reviewed GA. CODE ANN. § 32-653a finding no indication that local boards might not impose additional requirements for graduation. *Id.* The court read the state board's policy as specifically permitting local boards to require additional credit units for graduation and making it the responsibility of local boards to establish "performance objectives" and "performance indicators." *Id.* As to the due process question, the court reasoned that the appellants had not been denied the right to take part in the public education system, but that the test requirement was ensuring that they received a benefit from the system before leaving. *Id.* In any event, the court found that more than enough notice of the achievement test had been given to students and parents. *Id.* The court also found no merit in the appellant's charge that they had been denied equal protection. *Id.* Looking to the administration of the requirement in Tattnal County rather than statewide, the court found it uniformly applied. *Id.* at 273.

[45] *Anderson*, 520 F. Supp. at 476-77.

In addressing these issues, the court found that although the success rate of black students was less than that of white students, insufficient evidence of discriminatory intent was offered to establish a violation of the equal protection clause. In addition, the court held, "[I]nsofar as the poor performance of the black children is attributable to their participation in the dual system, the diploma sanction must fall. It cannot be constitutionally imposed on those who attended classes in the dual system."[47] The court also found that the diploma sanction, since it was unconstitutional, violated Title VI and the Equal Educational Opportunities Act.[48] Citing the Fifth Circuit's decision in *Debra P.*, the court found a protectable property interest in high school graduation for students for whom the graduation requirements had changed, holding that "[i]n the case at bar, a notice period of more than two years, the provision that the test may be retaken, and the provision of remedial courses considered together are not constitutionally inadequate."[49] Finally, the court praised school authorities for their reliance on a well-established testing instrument. But again, citing *Debra P.*, the court held that the school authorities had not demonstrated that the items on the CAT were actually taught in the schools.[50]

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[46] *Id.* at 477.

[47] *Id.* at 500.

[48] *Id.* at 503. Reasoning that the diploma policy violated the equal protection clause of the fourteenth amendment, the court concluded that the policy also violated Title VI of the Civil Rights Act of 1964. *Id.* Likewise, considering the plaintiff's equal protection claim, the court found that the imposition of the diploma requirement on black students who had previously attended substandard segregated schools and were then subjected to the tracking system in Tattnal County Schools violated the Equal Educational Opportunities Act. *Id.*

[49] *Id.* at 505. The court's view was that notice becomes constitutionally inadequate when it renders rules or regulations unreasonable. *Id.* In view of the judicial system's traditional deference to the educational expertise of school authorities, the court could not hold that the notice was unreasonable. *Id.*

[50] *Id.* at 508. The requirement stated by the court in *Debra P.* was that the test must be a "fair test" of that which was taught. *Id.* The court concluded that where the award of a diploma depended on the outcome of a test, the burden was on the school authorities to show that the test covered only material actually taught. *Id.* The court found that the Tattnal County School District had not sustained its burden. *Id.*

An additional evidentiary hearing on whether the material covered on the CAT had actually been taught by the plaintiffs' school district was held by the United States District Court for the Southern District of Georgia.[51] The court found a review of the developmental materials used in grades one through eight and the remedial materials used in the high school outweighed the other evidence presented. The court stated:

> "[I]n view of a long line of decisions giving great deference to the academic decisions of school authorities and recognizing the problems of justiciability inherent in judicial review of an academic standard, the Court, while placing the burden of proof on school authorities to demonstrate that the exit examination must be a fair test of the material taught in accordance with *Debra P.*, nevertheless determines that some deference is to be given to the authorities' decisions in reviewing that proof. In the Court's opinion, the school authorities met their burden of proof fully and completely."[52]

No further appeals of the preceding cases are anticipated. Therefore, the law is settled in similar fact situations, similarly argued, before similar courts. However, the limits of the factual, legal, and judicial circumstances of the cases remain to be determined. Not all functional literacy problems are the same, and not all courts view facts in the same way. New law may certainly arise from factual or judicial differences. The remainder of this article discusses legal issues that have yet to be resolved by the courts. It is these remaining issues that most strongly suggest the potential for new law with respect to functional literacy examinations.

III. Equal Protection Issues

Certain equal protection issues appear to be resolved. Functional literacy examinations are not in themselves arbitrary, unreasonable or unrelated to the reasonable purpose of improving the quality of public education.[53] Only an extraordinary factual situation would now require a court to address the effects of attendance in segregated schools.[54] Use of functional literacy examinations to place students in remedial classes in order to correct identified deficiencies is constructive, not resegregative.[55]

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[51] *Anderson*, 540 F. Supp. at 761. The court agreed to the additional hearing because the court, as well as the defendants, were unaware that the school district had the burden of proof. *Id.* It was not until the Fifth Circuit's decision in *Debra P.* that the nature of the burden of proof was resolved.

[52] *Id.* at 765.

Other equal protection issues, however, remain unresolved. One commentator, Frizzell, has criticized *Debra P.* for its failure to consider the disproportionate impact of the functional literacy examination upon black students as evidence of intent to discriminate.[56] Frizzell argues that "[i]n *Debra P.*, the facts warranted an inference of intent under *Washington v. Davis* because the defendants could suggest only racial explanations for the test results."[57] Later, he stated that "[g]iven the evidence that strongly suggested that discriminatory intent may have been one of the factors influencing the defendants, the court should have explicitly inferred intent and thus placed the burden on the defendants to rebut this inference."[58] Future challenges to functional literacy examinations may use this reasoning.

Another scholar, Teicher, has argued that where black and minority students who fail a functional literacy examination are not provided remedial help, "the state is arguably providing unequal educational opportunity and thus denying black and minority students equal protection of the law."[59] He also contended that failure to provide remedial help might constitute denial of the minimally adequate education required under *San Antonio Independent School District v. Rodriguez.*[60] In such instances, a state would need to demonstrate a compelling state interest in its actions, a burden difficult to sustain.[61]

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[53] *See supra* note 14 and accompanying text.

[54] *See supra* notes 21 and 22 and accompanying text.

[55] *See supra* note 20 and accompanying text.

[56] Frizzell, *Functional Literacy Testing and the Denial of High School Diplomas in a Post-Desegregation Setting*: Debra P. v. Turlington, 33 RUTGERS L. REV. 564, 564 (1981).

[57] *Id.* at 590.

[58] *Id.* at 593. Frizzell argued that if defendants could not meet this burden, then the court should find the test unconstitutional unless it was of compelling necessity and not merely rationally related to accomplishing a permissible government goal. *Id.*

[59] Teicher, *Minimum Competency Test Requirements for High School Graduation: Are We Boxing in Minority Students for a Lifetime of Failure?*, 8 HUM. RTS. 20, 49 (1980).

[60] *Id.* at 49. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1972)

Both Frizzell and Yoerges have criticized the failure of *Debra P.* to track carefully the vestiges of past school desegregation.[62] Frizzell states:

> Although many of the problems recognized by the court affected all black children, those who began their public schooling after the completion of physical integration in 1971 as well as those who began school during the time of segregation, the court did not take this fact into account when granting relief. Its remedy of a four-year injunction was predicated on the erroneous assumption that these problems, "taints" of the dual school system, would be dissipated upon the graduation of all black students who had spent any part of their education in the dual school system. This assumption is inconsistent with the court's acknowledgement that the many human problems upon integration "attest to the difficulty [of black children] in making significant academic gains" [footnote omitted] and "have limited [their] full appreciation of the benefits of a unitary education."[63]

Yoerges states the point differently:

> [A] court employing a "reasonable" standard should recognize that the proximity between past racial animus and present dis-

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involved the financing of public elementary and secondary schools in Texas. *Id.* at 4. The case was brought on behalf of school children said to be members of minority groups, poor residents of school districts that had a low property tax base. *Id.* at 5. The complaint alleged that the finance system was constitutional under the equal protection clause. *Id.* at 6. In holding for the school district, the Court stated that the efforts of the state legislature were devoted to establishing a means of guaranteeing a minimum statewide educational program without sacrificing the vital element of local participation. *Id.* at 48.

[61] Teicher, *supra* note 59, at 49.

[62] Yoerges, *Florida Functional Literacy Testing: Surviving Equal Protection Challenges*, 13 Stetson L. Rev. 387, 399 (1984). The *Debra P.* court determined that although vestiges of past purposeful segregation remained to some degree, the present vestiges did not constitute a violation of equal educational opportunity. Debra P. v. Turlington, 564 F. Supp. 177, 187 (M.D. Fla. 1983). In spite of the fact that there was testimony that blacks encountered negative educational experiences and that a lack of black school administrators severely reduced black student motivation, the court rejected this evidence as oversweeping and anecdotal. *Id.*

[63] Frizzell, *supra* note 56, at 588.

> proportionate results need not be intimately direct in order to be unfairly or unconstitutionally burdensome. More importantly, a court should place less emphasis on whether a student was and was not actually involved in past segregation and more emphasis on critically analyzing the nature of the burdens imposed on black students due to their disproportionate failure rate.[64]

Both lines of argument support further testing of the past discrimination issue.

The cases reviewed have resolved basic legal issues concerning test bias as well as the content, construct, and curricular validity of functional literacy examinations. The application of these issues to particular tests may prompt refinement of the applicable standards. More interesting, however, are several additional validity questions.

For example, the meaning of the construct "functional literacy" has been questioned by several commentators. One scholar, Young, states that if the construct is not defined specifically, its use is subject to constitutional and statutory challenges.[65] Young and McClung point out that certain definitions of functional literacy may be unteachable or unmeasurable, and thus invalid.[66] McCarthy has stated that "[i]t would be interesting" to see a suit challenge a pregraduation examination on the ground that it is not a valid predicator of life success.[67] Pullin has raised a more technical point:

> The problem of curricular match is compounded when the [functional literacy examination] attempts to test the ability of students to apply basic [academic] skills in "real world" situations. The intent of the testers to measure the application of skills is laudable. But test-makers should take care that the real-world context that they provide does not confound students who could otherwise perform the underlying skill. For example, a student who has never seen a federal income tax

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[64] Yoerges, *supra* note 62, at 407.

[65] Young, *Legal Aspects of Minimum Competency Testing in the Schools*, 16 LAND & WATER L. REV. 561, 561 (1981).

[66] *Id.* at 577-82; McClung, *supra* note 2, at 651.

[67] McCarthy, *Newsnotes: Testing Students May Raise Issues for Reformers*, 68 PHI DELTA KAPPAN 484 (1987).

> form may well be so confused by it that he or she will be unable to demonstrate the basic ability to add, subtract, or divide.[68]

Even valid prediction can be confused by mechanical shortcomings of the tests themselves.

The "concurrent validity" of a given definition of functional literacy may also be subject to challenge. Such a test of validity might require, at the minimum, agreement among knowledgeable people acting independently as to the meaning of the construct.

IV. Due Process Issues

The cases reviewed indicate that several due process issues are resolved. For example, a protectable property interest in graduation from high school exists when students who have fulfilled all requirements for graduation must suddenly satisfy an additional requirement.[69] Students also possess a protectable liberty interest in being free of the stigma as well as the psychological and economic consequences of being found functionally illiterate.[70] Either interest requires rational action by state officials, including sufficient notice to all persons affected.[71]

However, an interesting due process issue concerning the establishment of passing scores remains unresolved. Pryor argues that to avoid arbitrariness such a standard-setting technique must demonstrate a "conceptual relation between the method and the existence of minimum competency."[72] One questionable technique that Pryor identifies is for officials to let political or financial factors determine the passing score.[73] McClung takes note of the "inherently subjective and political nature of setting [such] standards."[74] A second questionable technique identified by Pryor is selection of the passing score based on the distribution of test scores and on a certain percentage of students who should pass.[75] Neither technique meets the test of rationality.

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[68] Pullin, *Minimum Competency Testing and the Demand for Accountability*, 63 Phi Delta Kappan 20, 211 (1981).

[69] Debra P. v. Turlington, 644 F.2d 397, 403-04 (5th Cir. 1981).

[70] Brookhart v. Illinois State Bd. of Educ., 697 F.2d 179, 184-85 (7th Cir. 1983).

[71] *Debra P.*, 644 F.2d at 406.

[72] Pryor, *Student Competency Testing in Texas*, 16 St. Mary's L.J. 903, 920 (1985).

[73] *Id.*

[74] McClung, *supra* note 2, at 671.

V. STATUTORY ISSUES

Certain statutory issues also appear to be resolved. Ordinary rules of statutory construction can be used to determine the authority of the state legislature or local school officials to establish a diploma sanction.[76] It is further settled that discrimination under the equal protection clause will also violate Title VI of the Civil Rights Act of 1964 and the Equal Educational Opportunities Act of 1976.[77]

New ground could be broken when functional literacy examinations are challenged directly under federal discrimination law. Benjes has identified three possible Title VI theories: an effects test borrowed from employment testing, a vestiges-of-segregation test, and a test based on intent to discriminate.[78] Teicher, relying on bilingual-education cases and HEW guidelines, has found authority for requiring special assistance for minority students who fail a functional literacy examination.[79] The weakness of unsuccessful equal protection arguments may not be fatal if raised in a statutory context.

VI. FIRST AMENDMENT ISSUES

The cases to date do not address first amendment issues. Clague has succinctly described the potential for such challenges:

> Possible first amendment challenges may arise if comprehensive views of the mission of education are linked to student accountability and translated into test items designed to assess the appropriateness or correctness of attitudes, opinions or even behavior. The state's interest in scoring student values on

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[75] Pryor, *supra* note 72, at 920.

[76] Debra P. v. Turlington, 644 F.2d 397, 402-03 (5th Cir. 1981).

[77] Anderson v. Banks, 520 F. Supp. 472, 503 (S.D. Ga. 1981).

[78] Benjes, *The Legality of Minimum Competency Test Programs Under Title VI of the Civil Rights Act of 1964*, 15 HARV. C.R.-C.L. L. REV. 537, 542-43 (1980).

[79] Teicher, *supra* note 59, at 50-51.

> matters of politics, beauty, parenting, interpersonal skills, cooperation, attitudes toward school and work, and sexual orientation has been rendered constitutionally suspect by *Barnette* and *Tinker*, and possibly by *Yoder*.[80]

Other commentators have discussed the specific issues of cultural bias, coerced belief, and invasion of privacy.[81] This entirely new area may support challenges to functional literacy examinations which test non-academic performance.

VII. Conclusion

A number of legal issues concerning functional literacy examinations have yet to be resolved. Equal protection issues remain concerning disproportionate impact as evidence of intent to discriminate,[82] remedial instruction for students who fail the test,[83] the continuing effects of racial segregation once desegregation has been achieved,[84] specificity in the definition of functional literacy,[85] the predictive validity of the construct,[86] the technical shortcomings of functional literacy examinations, and validation of the construct by concurrent validity procedures.[87] A due process issue remains concerning the establishment of passing scores.[88] Statutory challenges to functional literacy examinations have yet to be exhausted arising from discriminatory effects, vestiges of segregation, discriminatory intent, and the necessity for special assistance to minority students failing the examination.[89] A variety of first amendment expression grounds are available to those who would challenge certain functional literacy examinations.[90] Functional literacy examinations are legally vulnerable to a variety of attacks. Policy makers would be wise to consider these legal issues as they develop, review, or revise functional literacy examination programs.

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[80] Clague, *Competency Testing and Potential Constitutional Challenges of "Everystudent,"* 28 Cath. U.L. Rev. 469, 507 (1979).

[81] *See, e.g.*, Comment, *Minimum Competency Testing — Redundancy or Necessity? An Analysis of the Educational and Legal Issues*, 15 Akron L. Rev. 91, 91 (1981); Young, *supra* note 65, at 572; Logar, *supra* note 2, at 35; McClung, *supra* note 2, at 666.

[82] *See supra* note 56 and accompanying text.

[83] *See supra* note 59 and accompanying text.

[84] *See supra* note 62 and accompanying text.

[85] *See supra* notes 65-67 and accompanying text.,

[86] *See supra* note 66 and accompanying text.

[87] *See supra* note 68 and accompanying text.

[88] *See supra* note 72 and accompanying text.

[89] *See supra* notes 70-71 and accompanying text.

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[90] *See supra* note 80 and accompanying text.

SEX DISCRIMINATION IN PUBLIC EDUCATION

*Carolyn Ellis Staton**

Discrimination on the basis of sex has historically been rampant in this country's public schools.[1] Yet it was in the aftermath of two of the great social movements of the 1960's, the civil rights movement and the women's movement, that sexual bias became a major policy issue in America.[2] In the initial efforts to eliminate sexual bias in critical areas of American society, those trying to achieve equality in education patterned their efforts after the civil rights' movement, focusing on expansion of the fourteenth amendment's equal protection doctrine.[3] Spurred by national concern, Congress began to focus on discrimination in education based on sex, resulting in the passage of Title IX of the Education Act Amendments of 1972, the primary tool defining equal educational opportunities on the basis of sex.[4]

In keeping with this policy, Congress also amended at least three major statutes to alleviate sex discrimination in education, the most important being the amendment of Title VII of the 1964 Civil Rights Act to include as a protected class employees

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[1] *See, e.g.*, Berkelman v. San Francisco Unified School Dist., 501 F.2d 1264 (9th Cir. 1974)(public secondary admissions quotas based on sex); Burkey v. Marshall County Bd. of Educ., 513 F. Supp. 1084 (N.D. W. Va. 1981)(lower pay for coaches of girls' athletic teams).

[2] R. SALOMONE, EQUAL EDUCATION UNDER LAW 143 (1986). The success of racial minorities encouraged women to seek reform through legislative and judicial action. *Id.* Women who had participated in the antiwar and civil rights movements acquired skills in organizing group pressure to effect social change. *Id.*

[3] *Id.*

[4] Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1976). Section 1681 states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." *Id.*

of educational institutions.[5] Additionally, in 1972 Congress amended both the Equal Pay Act of 1963[6] and the Public Health Service Act,[7] the former to deter discrimination against professional employees and the latter to insure equality in admissions to health education programs, including medical schools.[8]

Since there exist no Mississippi anti-discrimination statutes providing protection against sex discrimination in schools, aggrieved persons in Mississippi must rely upon either the United States Constitution[9] or upon federal statutes, primarily Title IX, for protection. Therefore, this paper will focus on the federal statutory and constitutional provisions for eliminating sex discrimination.

I. STATUTORY AND CONSTITUTIONAL BASIS FOR DISCRIMINATION CLAIMS

A. *Title IX*

Congress enacted Title IX to encourage equal treatment of both sexes in education.[10] The act, which prohibits sex discrimination in programs receiving federal financial assistance, has two core provisions, modeled after Title VI of the 1964 Civil Rights Act.[11] The core provisions include section 901(a),[12] a program-specific ban on sex discrimination in education, and section 902,[13] authorizing promulgation of regulations to secure compli-

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[5] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1970).

[6] Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1982).

[7] Public Health Service Act, 42 U.S.C. § 292(d) (1982).

[8] *See* ARNOLD, LEGAL CONSIDERATIONS IN THE ADMINISTRATION OF PUBLIC SCHOOL PHYSICAL EDUCATION AND ATHLETIC PROGRAMS 298-99 (1983).

[9] Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 722 (1982)(using equal protection clause of fourteenth amendment to uphold plaintiff sex discrimination claim).

[10] *See supra* note 4.

[11] Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) (1982). Section 2000(d) prohibits discrimination in federally assisted programs on the basis of race. *Id.*

[12] 20 U.S.C. § 1681(a) (1982). *See supra* note 4.

[13] 20 U.S.C. § 1682 (1982). Section 902 provides in part:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity . . . is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general ap-

ance with section 901(a) and termination of federal funding if compliance is not voluntary. The chief impact of Title IX has been in forcing schools to comply with the law, an impact so effective that Title IX has not spawned a great deal of litigation.

As a result of the small body of interpretative law, one must look not only at Title IX, but also at an analogous law, Title VI of the 1964 Civil Rights Act, in order to understand or predict Title IX.[14] Even though Title VI served as the model for Title IX, the acts are not identical as some major differences exist between the two statutes.[15] For instance, Title VI is broader, forbidding racial *and* ethnic discrimination. Moreover, unlike Title IX, which is restricted to discrimination in education programs, Title VI's prohibitions extend to *any* kind of program receiving federal financial assistance.[16]

The enforcement portion of Title IX results from the constitutional inability of the federal government to make direct educational policy. Since the federal government is limited to indirect policy-making through its power to appropriate money,[17] the anti-discrimination provisions of Title IX can be enforced effectively by the government only through termination of federal funds to a discriminating institution.[18] It follows, then, that if an institution is not receiving federal funds, Title IX can have no such punitive effect.

The responsibility for enforcing Title IX lies with the Office of Civil Rights (OCR) in the Department of Education.[19] OCR has the responsibility for resolving complaints arising under the statute, reviewing compliance plans, and seeking termination of federal funds if an institution should fail to comply with the

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> plicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the activity is taken.

Id.

[14] Salomone, *supra* note 2, at 124.

[15] *Id.*

[16] *Id.*

[17] U.S. Const. art. I, § 9.

[18] Note, *Federal Legislation Prohibiting Sex Discrimination in Employment, Education, and Credit*, 1 N.Y. Sch. L. Hum. Rts. J. 197, 232 (1983).

[19] Salomone, *supra* note 2, at 124.

statute.[20] The federal regulations empower the OCR to make both periodic compliance reviews[21] and investigate complaints.[22]

Title IX expressly imbues the federal government with authority to file legal action against noncomplying institutions.[23] However, courts have interpreted Title IX as permitting, additionally, a private cause of action. In *Cannon v. University of Chicago*,[24] the United States Supreme Court recognized that a private cause of action is implied in Title IX.[25] Of course, if a complainant filed an action under Title IX, she or he would generally be seeking a remedy other than termination of federal funds to the offending institution. The flexibility of suing privately means that a complainant does not have to wait for the federal government to take any action and that the aggrieved party may seek a remedy which gives more appropriate relief for her claim than does a termination of funds. In *Cannon* the Court indicated that it preferred individual relief over fund termination in private right of action cases.[26] One remedy that a plaintiff with a private cause of action might desire would be monetary damages. However, it is questionable whether a successful plaintiff can be awarded monetary damages.[27] It is more likely that courts would provide the aggrieved party with injunctive relief.

A major question concerning the extent of the government's enforcement powers under Title IX was addressed in 1984 by the United States Supreme Court in *Grove City College v. Bell*.[28] At issue was whether the federal government could terminate federal assistance to an entire institution when only a specific program of the institution was discriminating in violation of

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[20] *Id.*

[21] 20 C.F.R. § 100.7(a) (1984).

[22] 34 C.F.R. § 100.7(b) (1984).

[23] 20 U.S.C. §§ 1682-83 (1982).

[24] 441 U.S. 677 (1979).

[25] *Id.* at 709.

[26] *Id.* at 708.

[27] *See* Lieberman v. University of Chicago, 660 F.2d 1185, 1188 (7th Cir. 1981) (holding that Congress, not courts, should fashion additional remedy if one is needed), *cert. denied*, 456 U.S. 937 (1982).

[28] 465 U.S. 555 (1984).

Title IX.[29] The Supreme Court held in *Grove City College* that Title IX permitted termination of funds only to the specific programs which discriminated and did not permit termination of funds to the entire institution. This decision was roundly criticized as there was rather clear legislative history showing that Congress, in promulgating the statute, had intended that the funds to the entire institution be curtailed even if only a specific portion or program of that institution was in noncompliance.[30] As a practical result of *Grove City College*, a school might discriminate in some areas, such as athletics, without any government reprisals as long as the discriminatory programs were not receiving federal financial assistance.

Immediately following the decision, Congress moved to amend Title IX to include express language which would overrule the *Grove City College* case. In the 1987 Civil Rights Restoration Act Congress explicitly amended Title IX to reverse the holding in *Grove City College*.[31] As a result of that amendment, an institution now faces termination of funds to the whole institution should any program in the institution, regardless of whether the program is a direct or indirect beneficiary of federal financial assistance, discriminate on the basis of sex.[32]

B. *Equal Protection*

Another potent — and, relatively recent — weapon for combatting sex discrimination is the equal protection clause of the fourteenth amendment.[33] Prior to 1971, the United States Supreme Court used a two-tiered equal protection analysis. The traditional standard for analyzing claims of inequality had been to determine whether the state had some rational basis for creating different classifications or, said another way, for discriminating between two classes. As long as the state could show a non-arbitrary reason, a rational relationship was said to exist between the classification, the means, and the legitimate ends that were served by it.[34] All in all, the standard was a minimal one, with the burden of proof falling on the plaintiff.

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[29] *Id.* at 570-71. *Grove City College* had two major issues. The other issue was whether the receipt of Basic Opportunity Education Grants by its students constituted indirect aid to the college, and, if so, whether Title IX was applicable to institutions which did not receive direct federal aid but which did receive indirect aid. The Court found that the school was the indirect beneficiary of the federal aid, and that, therefore, Title IX did apply to the college. *Id.* at 563.

[30] *Sex Discrimination Regulations: Hearings Before the Subcomm. on Post-Secondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 180 (1975).

[31] Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988).

[32] *Id.*

[33] U.S. CONST. amend. XIV, § 1.

As equal protection theory evolved, the Court fashioned a higher level of scrutiny for classifications which were based on race. Since racial discrimination was the historical reason for the passage and ratification of the fourteenth amendment, the Court reasoned that racial classifications were inherently suspect.[35] Because of the suspect nature of racial classifications, the Court determined that they must be subjected to a higher level of scrutiny. Race-based classifications can withstand scrutiny only if the state has a *compelling* interest in the legitimate goals that are served, and if there are no other less drastic methods of achieving those goals.[36] Unlike cases involving the traditional equal protection analysis, in cases involving strict scrutiny, the burden is on the defendant.

Until 1971, the Court decided all equal protection claims brought by plaintiffs alleging sex discrimination by applying the rational relationship test. As a result, the complainant in each and every case lost, the Court always upholding some state basis as rational.[37] However, in 1971 in the landmark case of *Reed v. Reed*, the Court for the first time held that a state statute which made classifications on the basis of sex violated the fourteenth amendment.[38] Although not entirely clear, it appeared that the

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[34] Railway Express Agency v. New York, 336 U.S. 106, 117 (1949).

[35] *See* Loving v. Virginia, 388 U.S. 1, 12 (1967)(freedom of choice to marry could not be subject to invidious racial discrimination); McLaughlin v. Florida, 379 U.S. 184, 196 (1964)(cohabitation statute invalidly denied equal protection under Constitution). *But see* Korematsu v. United Sates, 323 U.S. 214, 222 (1944)(exclusion of Japanese from west coast areas).

[36] *See Loving*, 388 U.S. at 11 (racial classifications, subjected to "most rigid scrutiny," upheld only if accomplishing permissible state objective).

[37] *See* Hoyt v. Florida, 369 U.S. 57, 64 (1961)(upholding Florida statute according women exemption from jury service unless waived); Goesaert v. Cleary, 335 U.S. 464, 467 (1948)(Court upheld state statute prohibiting licensing of women as bartenders).

[38] 404 U.S. 71 (1971).

Court applied the lower level of scrutiny, the rational relationship test, to strike the Idaho intestate statute at issue in the case.[39]

Shortly after the *Reed* decision, the Court came close to declaring that sex was a suspect classification. However, the decision at hand, *Frontiero v. Richardson*, did not command a majority decision.[40] Ultimately the Court moved away from declaring sex a suspect classification, choosing instead to develop a new level of scrutiny applicable in sex-based discrimination cases. That test, an intermediate level of scrutiny, was first stated in *Craig v. Boren*[41] and later reaffirmed in *Mississippi University for Women v. Hogan*.[42] Under the intermediate level of scrutiny, a sex-based classification may be permitted only if a *substantial*, rather than a rational, governmental interest is served.[43] Using the *Craig v. Boren* test, it is somewhat easier for plaintiffs to succeed in an equal protection case than it was previously.

II. TYPES OF SEX DISCRIMINATION IN EDUCATION

A. *Admissions*

For several years before the passage of Title IX, challenges under the fourteenth amendment's equal protection clause to the admission policies of single-sex schools and colleges began to arise. The first challenges by women were unsuccessful.[44] Men also challenged the admission policies of state single-sex schools excluding them, although initially, to no avail.[45]

Many of the earliest challenges involved state colleges or universities.[46] However, attacks on single-sex lower schools occurred as well, both in state courts and federal courts.[47] While sex segregation of two single-sex secondary schools was upheld in *Vorchheimer v. School District*,[48] different admission policies for co-educational schools have not withstood constitutional challenges.[49] Even when the schools were not co-educational, but the same public entity governed and used different academic criteria for males and females for admission, a constitutional violation has been found.[50]

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[39] *Id.* at 75-77.

[40] 411 U.S. 677, 691 (1973).

[41] 429 U.S. 190, 197-98 (1976).

[42] 458 U.S. 718, 723-25 (1982).

[43] *Craig*, 429 U.S. at 197-98.

[44] *See* Heaton v. Bristol, 317 S.W.2d 86, 100 (Tex. Civ. App. 1958) (single-sex admission policy at state university found not to violate equal protection clause), *cert. denied*, 359 U.S. 230 (1959).

[45] *See, e.g.*, Williams v. McNair, 316 F. Supp. 134 (D. S.C. 1970) (legislative classification using rational basis not violative of equal protection clause), *aff'd mem.*, 401 U.S. 951 (1971).

The landmark single-sex school case is *Mississippi University for Women v. Hogan.*[51] In *Hogan*, the Court upheld the male plaintiff's equal protection challenge.[52] Using the intermediate scrutiny test that it first fashioned in *Craig v. Boren*,[53] the Court determined that no substantial state purpose was achieved by the university's exclusion of men from its nursing program. Had the state been able to prove that Mississippi University for Women provided compensatory education for women who had been deprived of an education, its argument would have been more meritorious.[54] However, since nursing as both a practical discipline and as an academic study has traditionally been a part of the woman's domain, the state's argument that the school's single-sex admission policy compensated women for past discrimination lacked credibility[55]

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[46] *See Heaton*, 317 S.W. 2d at 100 (in suit by women to enter Texas A & M, all-male public institution, Texas Court of Civil Appeals denied plaintiffs' claim, holding no constitutional right violated), *cert. denied*, 339 U.S. 230 (1959). The issue later arose in Kirstein v. Rector & Visitors of the Univ. of Va., 309 F. Supp. 184 (E.D. Va. 1970). In *Kirsten*, female plaintiffs sued to enter the all-male University of Virginia. *Id.* at 185. The district court dodged the equal protection issue, claiming that the case was moot since the University of Virginia had voluntarily agreed to admit women. *Id.* at 188. In Williams v. McNair, the issue was confronted directly. *Williams*, 316 F. Supp. at 136-37. Male plaintiffs sought admission to Winthrop College. *Id.* at 135. At that time South Carolina operated two single-sex institutions, Winthrop for women, and the Citadel, a military-type school, for men. *Id.* at 136. Applying the rational relationship test, the district court held that the state's college structure did not violate the fourteenth amendment. *Id.* at 138.

[47] *See, e.g.*, Vorchheimer v. School Dist. of Philadelphia, 532 F.2d 880, 888 (3d Cir. 1976) (gender-based classifications for high school admissions upheld), *aff'd*, 430 U.S. 703 (1977); Berkelman v. San Francisco Unified School Dist., 501 F.2d 1264, 1270 (9th Cir. 1974)(stricter admissions standards for females held violative of fourteenth amendment); Bray v. Lee, 337 F. Supp. 934, 935 (D. Mass. 1972)(males admitted to school over females scoring higher held to be illegal discrimination).

[48] *Vorcheimer*, 532 F.2d at 888. One commentator discusses a later case, Newburg v. Board of Public Education, which resulted in an order that female students be admitted to Central High School. Salomone, *supra* note 2, at 120-22 (citing Newburg v. Board of Pub. Educ., 9 Phil. Cty. Rep. 556, 570 (1983)). The trial court in *Newburg* applied the intermediate level of scrutiny finding that there was no substantial governmental interest in excluding females from Central High School. *Id.*

[49] *Berkelman*, 501 F. 2d at 1270.

[50] *Bray*, 337 F. Supp. at 937.

[51] 458 U.S. 718 (1982).

[52] *Id.* at 733. The plaintiff Hogan was a male registered nurse who wanted to be admitted to the baccalaureate program at the state-supported, all-female Mississippi University for Women. *Id.* at 720. The special training he would receive in the baccalaureate program would enable him to receive a higher salary. *Id.* at 720 n.3.

With regard to eliminating different admission standards, Title IX affects only certain types of institutions. For instance, in the area of admissions, the statute is applicable only to vocational education, professional and graduate education, and public undergraduate institutions.[56] This essentially exempts public and private elementary and secondary schools and private undergraduate schools, and historically single-sex public undergraduate schools from compliance with the act.[57] Although these institutions are specifically exempted by the statute, there is still the possibility that discrimination in admissions by any of the excepted categories can not withstand a constitutional challenge.[58]

Additionally, under some circumstances sex segregation might be attacked under the Equal Educational Opportunities Act (EEOA).[59] The EEOA prohibits the denial of equal educational opportunity on the basis of race, sex, or national origin.[60]

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[53] 429 U.S. 190 (1976).

[54] *Id.* at 729.

[55] *Id.*

[56] 20 U.S.C. § 1681(a)(1) (1976).

[57] The continued validity of this last provision after *Hogan* is dubious.

[58] *See, e.g., Hogan*, 458 U.S. at 732 (Congress' power to enforce fourteenth amendment limited to adoption of measures protecting guarantees, rather than restricting or diluting them).

[59] 20 U.S.C. §§ 1701-1758 (1976).

[60] *Id.* § 1703(a). The Equal Educational Opportunites Act (EEOA) states in pertinent part: "[n]o state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin by (a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools. . . ." *Id.*

United States v. Hinds County School Board illustrates the impact of the EEOA.[61] This case involved a 1969 desegregation plan devised by Amite County, Mississippi, which assigned students to schools on the basis of sex.[62] This school reorganization scheme provided Amite County with two boys' schools and two girls' schools.[63] Amite County argued that its school redistricting plan was motivated by sound educational principles and not by racial concerns.[64] The court stated that Congress's purpose in enacting the EEOA was based on a determination that "the maintenance of dual school systems in which students are assigned to schools solely on the basis of race, color, sex, or national origin denies to those students the equal protection of the laws guaranteed by the fourteenth amendment. . . ."[65] The court noted that sex segregation of a school district resulted in the kind of dual school system with the attendant harm that the EEOA was designed to eliminate.[66]

The Act defined segregation as "the operation of a school system in which students are wholly or substantially separated among the schools of an educational agency on the basis of race, color, sex, or national origin."[67] The Fifth Circuit resolved some statutory ambiguities by declaring that within a school system, the statute prohibits student assignments to various schools on the basis of race, color, sex, or national origin.[68] On the other hand, within a single school, the EEOA prohibits only segregation on the basis of race, color, or national origin; it does not prohibit sex segregation.[69] Nonetheless, while the EEOA may not prohibit sex segregation within a single school, Title IX may prevent sex segregation of classes.

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[61] 560 F.2d 619 (5th Cir. 1977).

[62] *Id.* at 621.

[63] *Id.*

[64] *Id.* at 623.

[65] *Id.* (citing 20 U.S.C. § 1702(a)(1) (1982)).

[66] *Hinds County School Bd.*, 560 F.2d at 623.

[67] 20 U.S.C. § 1720(c)(1982).

[68] *Hinds County School Bd.*, 560 F.2d at 624.

[69] *Id.*

B. Vocational Education

One of the major forms of sex discrimination in education has been in the area of vocational education, available at various levels of education. In vocational education programs, often referred to as "vo-tech", it has been customary for women to be channeled into clerical and domestic programs in preparation for work in these typically low-paying occupations. Men, on the other hand, have been steered into the training programs for technical, trade, and crafts occupations, generally higher paid occupations. This form of sex segregation has been a result, in part, of society's stereotypical thinking about the proper work roles for men and women.

Title IX explicitly prohibits sex discrimination in admission to vocational education programs, regardless of the level at which such programs are offered.[70] In those instances where single-sex elementary and secondary schools might be countenanced under Title IX, Title IX requires that the vocational education offerings at the boys' and girls' schools be comparable.[71] Thus, a carpentry course offered at a boys' school also must be available at a girls' school.

C. Dress Codes

As originally implemented, federal regulations under Title IX prohibited discrimination in grooming rules.[72] During the time that this specific regulation was in effect, apparently only one case was decided under it. *Trent v. Perritt*,[73] a case arising in Mississippi, involved a student who wished to wear his hair longer than permitted by his school's grooming code.[74] The district court upheld the dress code, declaring that the regulation did not constitute sex discrimination pursuant to Title IX.[75] The court's decision was consistent with the approach taken by courts in determining whether dress codes constitute sex discrimination under Title VII of the 1964 Civil Rights Act, relating to employment discrimination.[76]

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[70] 20 U.S.C. § 1681(a)(1)(1982).

[71] *Id.*

[72] 34 C.F.R. § 106.31(b)(5)(1982). The pertinent portion of Title IX states that "in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex. . .[d]iscriminate against any person in the application of any rules of appearance." *Id.* (repealed by 47 Fed. Reg. 32526 (1982)).

[73] 391 F. Supp. 171 (S.D. Miss. 1975).

[74] *Id.*

[75] *Id.* at 173.

During the Reagan Administration the federal regulation governing dress codes was withdrawn.[77] Although some commentators believe that a challenge under Title IX might still be viable,[78] Title IX has been rendered largely ineffective as a method of challenging dress codes. Nonetheless, discriminatory dress codes may still be challenged on constitutional grounds. However, constitutional objections to hair codes have a mixed success rate.[79] Apparently only one case directly challenged a school appearance code on the basis of impermissible sex discrimination under the fourteenth amendment, and that challenge prevailed.[80]

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[76] *See, e.g.*, Fountain v. Safeway Stores, Inc., 555 F.2d 753, 756 (9th Cir. 1977)(employee's discharge for failure to wear necktie did not constitute sex discrimination); Barker v. Taft Broadcasting Co., 549 F.2d 400, 401 (6th Cir. 1977)(grooming code permitted by court); Longo v. Carlisle De Coppet & Co., 537 F.2d 685, 685 (2d Cir. 1976)(termination of male employee for wearing long hair did not violate Title VII); Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084, 1092 (5th Cir. 1975)(grooming code treated both sexes equally, holding them to generally-accepted community standards of dress and appearance).

[77] 47 Fed. Reg. 32,526 (1982). The Secretary of Education amended the Title IX regulation by revoking the section which prohibited discrimination in applying codes of personal appearance. *Id.* The regulation was intended to allow the Department of Education to concentrate on "issues that are more clearly related to the prohibition against sex discrimination." *Id.* at 32,526-27.

[78] N. CAMPBELL, M. GREENBERGER, M. KOHN, & S. WILCHER, 1 SEX DISCRIMINATION IN EDUCATION: LEGAL RIGHTS & REMEDIES 2-63 to 66 (1983).

[79] *See, e.g.*, Holsapple v. Woods, 500 F.2d 49, 52 (7th Cir.)(high school hair code held unconstitutional), *cert. denied*, 419 U.S. 901 (1974); Arnold v. Carpenter, 459 F.2d 939, 944 (7th Cir. 1972)(same); Massie v. Henry, 455 F.2d 779, 783 (4th Cir. 1972)(same); Richards v. Thurston, 424 F.2d 1281, 1286 (1st Cir. 1970)(same). *Contra* Zeller v. Donegal School Dist., 517 F.2d 600, 606 (3d Cir. 1975)(nature of schools held to demand curtailing students' liberties and freedoms); Karr v. Schmidt, 460 F.2d 609, 613 (5th Cir. 1972)(no constitutional right to wear hair in public high school in manner and length suiting wearer); Freeman v. Flake, 448 F.2d 258, 261 (10th Cir. 1971)(courts should allow states to determine hair codes in schools), *cert. denied*, 405 U.S. 1032 (1972).

[80] *See* Crews v. Cloncs, 432 F.2d 1259, 1266 (7th Cir. 1970)(school must satisfy "burden of substantial justification" to exclude long-haired student from school).

D. Student Pregnancy

The unfortunate reality is that teenage pregnancies constitute a significant social problem, a problem compounded by the fact that should the teenage mother quit school she stands a considerable chance of becoming a part of the growing feminization of poverty.[81] It is, therefore, very important, both socially and economically, to see that pregnant students, married students, and student mothers continue their education. Concomitant with this consideration is the concern that such students not be discriminated against by the schools. The federal regulations governing Title IX specifically bars discrimination on the basis of sex with regard to these categories.[82]

Title IX's regulations further provide that a school shall not discriminate against any such students or exclude them from either curricular or extracurricular activities on the basis of pregnancy, childbirth, or post-pregnancy recovery. However, if the school has a separate program for mothers and mothers-to-be, the student may request voluntarily that she be allowed to participate in the separate program.[83] If a school does offer a separate program for mothers and mothers-to-be, the instructional portion of that program must be comparable to what is offered to non-pregnant students.[84] When a separate program exists, student participation must be completely voluntary. A school cannot force a student to obtain a physician's certificate that she is physically or emotionally capable of remaining in normal classes unless it requires other students to obtain a physician's certificate when receiving medical attention.[85] Furthermore, a school must give the student a leave of absence for as long as her physician considers it necessary. If the student takes a leave of absence, she must be reinstated at the point she was when she took the leave.[86]

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[81] The phrase "feminization of poverty" has become part of the vernacular of middle-class feminists. Fox-Genovese, *Women's Rights, Affirmative Action, and the Myth of Individualism*, 54 Geo. Wash. L. Rev. 338, 345 n.23 (1986).

[82] 34 C.F.R. § 106.40(a) (1987). The regulation provides that a recipient should not be treated differently on the basis of sex because of her "actual or potential parental, family, or marital status." *Id.* Additionally, the regulation requires that:

> A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

Id. § 106.40(b)(1).

[83] *Id.* § 106.40(b)(1).

[84] *Id.* § 106.40(b)(3).

Very little litigation under Title IX exists concerning pregnant students.[87] However, litigants have successfully challenged rules which discriminate on the basis of pregnancy or motherhood on constitutional grounds. In 1969 in *Perry v. Grenada Municipal Separate School District*[88] the federal district court held that Grenada could not exclude female students from school solely on the ground that they were unwed mothers.[89] Finding a violation of the equal protection clause of the fourteenth amendment, the court held that before the school district could exclude them, unwed mothers had a right to a hearing to determine their moral fitness to return to school.[90] Indeed, there seemed to be a presumption that unwed mothers were allowed to be readmitted *unless* there was a hearing proving that they lacked sufficient moral character to be in school. Proof that the unwed mothers were so morally deficient that they should not be admitted to school should be virtually impossible for a school district to substantiate. Implicit in *Perry* is the notion that it is, under some circumstances, constitutionally permissible to ban pregnant girls from school.[91] Despite this implication, Title IX should effectively prevent such an exclusion.

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[85] *Id.* § 106.41(b)(2).

[86] *Id.* § 106.41(b)(5).

[87] *See* Wort v. Vierling, 778 F.2d 1233, 1235-36 (7th Cir. 1985)(affirming order awarding costs to unwed mother discriminated against in dismissal from National Honor Society).

[88] 300 F. Supp. 748 (N.D. Miss. 1969). *See also* Shull v. Columbus Mun. Sep. School Dist., 338 F. Supp. 1376, 1378 (N.D. Miss. 1972)(students may not be excluded from school solely because they are unwed mothers).

[89] *Perry*, 300 F. Supp. at 753.

[90] *Id.*

[91] *Id.* at 752. The Court noted that it understood and appreciated the effect that an unwed pregnant girl could have on other students. *Id.* However, it reasoned that "after the girl has the baby and has the opportunity to realize her wrong and rehabilitate herself, it seems patently unreasonable that she should not have the opportunity to go before some administrative body of the school and seek readmission on the basis of her changed moral and physical condition." *Id.*

Other cases in which pregnant students have sought to remain in school are consistent with the *Perry* decision. In *Ordway v. Hargraves*,[92] the court held that a school's requirement that a pregnant student cease to attend classes violated the Civil Rights Act.[93]

E. Sexual Harassment

Although the problem of sexual harassment on college and university campuses has been a more widely documented concern,[94] sexual harassment at the lower school level constitutes an equally disturbing problem. The case of *Alexander v. Yale University*[95] is important for its determination that sexual harassment of students is a form of sex discrimination prohibited by Title IX.[96]

Pursuant to Title VII of the Civil Rights Act, the Equal Employment Opportunity Commission promulgated federal guidelines concerning sexual harassment, including a definition.[97] These guidelines are generally regarded as applicable under a Title IX claim as well. Sections 1 and 2 of these guidelines are easily adaptable to academia. The underlying rationale of both sections is the concern that the employer has dominance over the employee in the workplace. Likewise, in the educational context the teacher has power over the student.

The Title VII guidelines provide:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute

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[92] 323 F. Supp. 1155 (D. Mass. 1971).

[93] *Id.* at 1158.

[94] *See* Ingulli, *Sexual Harassment in Education*, 18 Rutgers L.J. 281, 285 (1987)(discussion of legal and other responses to problems of sexual harassment at university level); Crocker, *Annotated Bibliography on Sexual Harassment in Education*, 7 Women's Rts. L. Rep. 91, 92 (1982)(listing publications dealing with sexual harassment in education).

[95] 631 F.2d 178 (2d Cir. 1980). Plaintiff alleged that her grade of "C" in a course was the result of her rejecting the sexual advances of her teacher. *Id.* at 182. Plaintiff lost because her claim was not substantiated. *Id.* at 185.

[96] *Id.*

[97] 29 C.F.R. § 1604.11(a) (1988).

> sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[98]

Title IX requires that all schools covered under its provisions have a grievance procedure for sex discrimination complaints.[99] In theory, this established grievance procedure can be used for any type of complaint arising under Title IX. However, experience at some institutions has shown that sex harassment complaints are better processed under a specially designed grievance procedure rather than the general Title IX grievance procedure. While Title IX does not require a separate grievance procedure for sexual harassment claims, there is some merit to this contention. For example, a female student may be reluctant to complain to a male employee that a male teacher has sexually harassed her. The young woman, possibly already ill at ease about making the complaint, may feel less awkward discussing the problem with a female employee. A separate procedure for sexual harassment claims could insure that personnel of the same sex were available to assist the student with the problem. Furthermore, a separate procedure could be designed to guarantee anonymity to the complainant and to protect the alleged offender until such time as there might be a finding against the offender.

In addition to the possibility of bringing a sexual harassment complaint under Title IX, a complainant in Mississippi may seek to have criminal charges brought against a teacher where there have been actual sexual relations between the teacher and the student.[100] However, the statute is of limited utility since it penalizes only certain conduct and, therefore, is not a relevant concern in most forms of sexual harassment.

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[98] *Id.*

[99] 34 C.F.R. § 106.8 (1988).

[100] MISS. CODE ANN. § 97-29-3 (1972 & Supp. 1988).

Since *Alexander*, Title IX has been an available remedy for victims of sexual harassment. It seems that injunctive relief in a private action might be the most effective remedy for a student who is a victim of sexual harassment. School employees who are the victims of sex harassment, on the other hand, have the choice of filing a complaint under either Title VII or Title IX, a choice likely based on the remedy sought.[101]

F. Athletics and Sex Discrimination

The area which has received the most attention both under the fourteenth amendment and Title IX is school athletics. Before the passage of Title IX only a small percentage of girls was involved in high school athletics. By the end of the 1970s the percentage of girls participating in athletics had risen dramatically.[102] But the road to equal opportunity in school athletics has not been easy. From the very beginning it was obvious that the real controversy of Title IX centered on school sports. In 1974 at a press conference held to announce the release of proposed federal regulations to Title IX, then Secretary of Health, Education, and Welfare Casper Weinberger stated that not until that very moment did he realize that athletics was the single "most important subject in the United States today."[103] To say the least, sexist attitudes have been pervasive in this area. As one jurist noted, "Athletic competition builds character in boys. We don't need that kind of character in our girls, the women of tomorrow."[104]

The regulations which were finally promulgated specifically prohibit discrimination in athletics:

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[101] *See* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 532-36 (1982) (recognized Title IX prohibits sex discrimination against school employees as well as against students).

[102] In 1970 7.4% of athletes were girls. By 1978-79 this number had risen to almost 32%. N. Campbell, M. Greenberger, M. Kohn, & S. Wilcher, *supra* note 78, at 2-34 & 35 (citing United States Commission on Civil Rights, *More Hurdles to Clear*, 63 Clearinghouse Publication 11-12 (1980)).

[103] A. FISHEL AND J. POTTER, NATIONAL POLITICS AND SEX DISCRIMINATION IN EDUCATION 113 (1977) (quoting U.S. Dep't of Health, Educ. and Welfare, Transcript of Press Briefing of Secretary Caspar Weinberger (June 18, 1974)).

[104] Hollander v. Connecticut Interscholastic Athletic Conf., 164 Conn. Supp. 57 (1971), *appeal dismissed*, 164 Conn. 654, 295 A. 2d 671 (1972).

> No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.[105]

Despite Title IX, most litigation concerning athletic inequities has occurred under the fourteenth amendment. A constitutional violation is usually involved in discrimination against female participation in certain sports. As stated by one court, it is not the right to play a specific sport that is at issue. Rather, it is the right of female athletes to compete and to play if qualified and not to be treated differently than boy athletes.[106] In order to invoke the fourteenth amendment a plaintiff must show that a nexus exists between the action and the discrimination. If it is a school's rule which is discriminatory and the school is a public entity, then there is state action. Likewise, if a public school *district* has a discriminatory rule, there is state action. The more problematic example arises in those cases in which the offensive rule has been promulgated by an athletic association which is not a state agency.[107] In this instance one must examine whether the rule-making association is so interrelated with a state entity or school that a court is likely to find that there is state action.[108]

Those who urge separation of sexes in sports have relied primarily on three basic arguments.[109] The first argument is that it would cost more to have sex-integrated teams. This ground has an obvious ring of hollowness. (The cost factor argument has often been reversed and raised when a school fields only a boys' team; the school generally contends that it cannot afford a separate girls' team.)[110] The second reason given is that separate sports are necessary for the safety of female students.[111] Regarding this argument, the court in *Hoover v. Meiklejohn*,[112] a case involving the rights of girls to play on a boys' soccer team, scoffed at the notion of inherent physical inadequacy.[113] The third basis relied upon is that all-girl teams promote girls' athletic skills.[114] Regarding the third argument, the Court of Appeals for the Eighth Circuit in the important early case of *Brenden v. Independent School District 742*[115] noted that the determination of whether mixed sports would be detrimental to the development of girls' athletic skills required too much speculation.[116] This last argument, nonetheless, is often the basis for other courts' refusal to integrate sports teams.[117]

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[105] 43 C.F.R. § 86.41 (1988).

[106] *See* Reed v. Nebraska School Activ. Ass'n, 341 F. Supp. 258, 262 (D. Neb. 1972) (female student's interest in participating on boys' golf team and receiving instruction outweighed state's interest disallowing participation because of financial savings and prevention of student attacks on rules).

[107] *See, e.g.*, Force v. Pierce City R-VI School Dist., 570 F. Supp. 1020, 1030 (W.D. Mo. 1983) (rules and regulations of high school activities association and manner of promulgation and enforcement thereof constituted state action).

[108] *See* Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126, 1128 (9th Cir. 1982) (holding that actions by voluntary associations of schools constituted state action), *cert. denied*, 464 U.S. 818 (1983).

[109] Wong & Ensor, *Sex Discrimination in Athletics: A Review of Two Decades of Accomplishments and Defeats*, 21 GONZ. L. REV. 345, 373-74 (1985-86).

Courts have developed several different methods to handle the exclusion of girls from all-boy teams, depending on the circumstances.[118] For instance, if girls are excluded from a non-

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[110] *But see, e.g.*, *Reed*, 341 F. Supp. at 263 (rejecting argument that school cannot afford dual teams); Haas v. South Bend Community School Corp., 269 Ind. 515, 289 N.E.2d 495, 500 (1972)(same).

[111] *See, e.g.*, Leffel v. Wisconsin Interscholastic Athletic Ass'n, 444 F. Supp. 1117, 1122 (E.D. Wis. 1978)(rejecting safety argument); Yellow Springs Exempted Village School Dist. Bd. of Educ. v. Ohio High School Athletic Ass'n, 443 F. Supp. 753, 758 (S.D. Ohio 1977)(same); Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882, 891 (1975)(same).

[112] 430 F. Supp. 164 (D. Colo. 1977).

[113] *Id.* at 169.

[114] ARNOLD, *supra* note 8, at 286.

[115] 477 F.2d 1292 (8th Cir. 1973).

[116] *Id.* at 1302.

[117] *E.g.*, *Leffel*, 444 F. Supp. at 1121 (allowing exclusion of girls from boys' swim team due to different levels of competition); Ritacco v. Norwin School Dist., 361 F. Supp. 930, 932 (W.D. Pa. 1973)(allowing exclusion of girls from boys' tennis team to enhance quality and caliber of sports opportunities for both sexes).

[118] Hetzel, *Gender-Based Discrimination in High School Athletics*, 10 SETON HALL LEGIS. J. 275, 284-90 (1987). According to a federal regulation:

> Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that

contact sport and no counterpart girls' team is provided in that particular sport, courts have been inclined to strike the exclusion.[119] When there is no separate team for girls and the sport involved is a non-contact sport, courts have taken the position that the exclusion of girls from the boys' team violates the equal protection clause.[120] If an athletic opportunity is denied to an entire class, i.e., females, then an educational opportunity is foreclosed to that class. As stated by the court in *Hoover v. Meiklejohn*, "whether it is algebra or athletics, that which is provided must be open to all."[121] On the other hand, in cases involving state action, if the sport involved is non-contact and there are comparable athletic opportunities for males and females, the courts have been willing to uphold the exclusion of girls from the boys' team under the "separate-but-equal" doctrine.[122] In some cases, courts have been called upon to rule on the validity of different game rules for the separate boys' and

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> sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport.

45 C.F.R. § 86.41(b) (1987).

[119] *See infra* note 121 and accompanying text.

[120] *See, e.g.*, Bednar v. Nebraska School Activ. Ass'n, 531 F.2d 922, 923 (8th Cir. 1976)(sustaining lower court preliminary injunction which enjoined defendants from excluding female student from cross country competition on basis of sex); Brenden v. Independent School Dist., 477 F.2d 1292, 1302 (8th Cir. 1973)(holding that where high school provided male teams but not female teams in non-contact sports, rule prohibiting female participation in boys' athletic program was violative of fourteenth amendment's equal protection clause); Gilpin v. Kansas State High School Activities Ass'n, 377 F. Supp. 1233, 1242 (D. Kan. 1973)(holding rule which prohibited boys and girls from participating on same athletic team overbroad and thus violative of equal protection as applied to female student prevented from participation on boys' cross country team when no girls' team was provided); *Reed*, 341 F. Supp. at 262-63 (granting preliminary injunction enjoining activities association from preventing female student's participation on boys' golf team).

[121] *Hoover*, 430 F. Supp. at 169.

[122] *See, e.g.*, *Cape*, 563 F.2d at 795 (holding that different rules for girls' basketball do not run afoul of equal protection because girls are given equal opportunity for meaningful participation); O'Conner v. Board of Educ., 545 F. Supp. 376, 379-81 (N.D. Ill. 1982)(holding that refusal by school board to allow female student to try out for boys' basketball team was not violation of girls' equal protection rights where girls' team was provided); *Leffel*, 444 F. Supp. at 1121-22 (holding that equal protection clause of the fourteenth amendment did not require that girls be allowed participation on boys' swimming team where separate girls' team was provided).

girls' teams in the same sport.[123] This issue has been a prevalent factor in cases involving basketball, a sport in which girls have traditionally played a half-court game. Courts ruling on the girls' basketball issue have split on whether there is a constitutional justification for the difference in the game rules.[124] Title IX likewise permits "separate but equal" treatment. Federal regulations specify some of the factors that the government will examine to determine if girls and boys have equal athletic opportunities.[125]

Ironically, the "separate but equal" theory, while repudiated in race discrimination, remains valid in this context.[126] Of course, the critical question remains what constitutes "equal". The courts have indicated that equal means substantially equal support for male and female teams.[127] Therefore, separate teams will generally not be considered equal unless there is significant equality in items such as funding, travel, coaching, and so forth.[128]

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[123] *See supra* note 120.

[124] *See, e.g.*, Dodson v. Arkansas Activ. Ass'n, 468 F. Supp. 394, 398 (E.D. Ark. 1979)(holding that different game rules in girls' and boys' high school basketball deprived girls of equal protection in violation of fourteenth amendment; court noted in passing that girls in Mississippi were already playing full-court basketball). *Contra* Cape v. Tennessee Secondary School Athletic Ass'n, 563 F.2d 793, 795 (6th Cir. 1977)(holding that different game rules for girls' basketball were justified by distinct differences in physical characteristics and capabilities between sexes and thus not violative of equal protection); Jones v. Oklahoma Secondary School Activ. Ass'n, 453 F. Supp. 150, 155-56 (W.D. Okla. 1977)(holding that different rules for girls' basketball were not violation of plaintiff's equal protection rights because plaintiff's claimed deprivations did not give rise to equal protection arguments). *See generally*, Ridgeway v. Montana High School Ass'n, 633 F. Supp. 1564, 1582-83 (D. Mont. 1986)(holding that different rules regarding athletic seasons for boys' and girls' teams of same sport not violation of equal protection).

[125] 45 C.F.R. § 84.41(c) (1987). In determining whether equal opportunities are available, the administrators were to consider, among other factors:

> (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
> (2) The provision of equipment and supplies;
> (3) Scheduling of games and practice time;
> (4) Travel and per diem allowance;
> (5) Opportunity to receive coaching and academic tutoring;
> (6) Assignment and compensation of coaches and tutors;
> (7) Provision of locker rooms, practice and competitive facilities;
> (8) Provision of medical and training facilities and services;
> (9) Provision of housing and dining facilities and services;
> (10) Publicity
>
> Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute non-compliance with this section, but the Director may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

Id.

The third context in which sex discrimination in athletics has developed involves contact sports from which girls are generally excluded.[129] Here some courts have barred female participation altogether on the basis of federal regulations. Under Title IX's regulations, contact sports are construed to include boxing, wrestling, rugby, ice hockey, football, and basketball.[130] This list, however, is not exclusive; some jurisdictions have determined that baseball and soccer also are contact sports.[131] While courts have not generally applied the "separate but equal" principle to contact sports which would mandate a girls' team as well as a boy's team, at least one court has applied it to baseball, on the theory that baseball is not a contact sport.[132]

Some courts have also held that a comprehensive exclusion of women from contact sports cannot be justified under the Equal Protection Clause.[133] Thus, while a total exclusion of women from contact sports may be permissible under Title IX, it might, nonetheless, violate the fourteenth amendment. The Ohio case of *Clinton v. Nagy*[134] illustrates this point. In *Clinton*, a twelve-year-old girl claimed that she was denied the opportunity to play interscholastic football solely on the basis of sex.[135] The girl in question was 5'9" tall and weighed in excess of 200 pounds.[136] The court stated that she could not be automatically excluded from football based on the argument that as a female she had a lighter bone structure and was more susceptible to injury.[137] The court reasoned that since there were no height and weight requirements for boys, male participants could conceivably be more susceptible to injury than the plaintiff.[138]

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[126] Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

[127] *Hoover*, 430 F. Supp. at 170 (separate soccer teams might be constitutional if there was substantially equal support for each).

[128] *Id.* at 172.

[129] Hetzel, *supra* note 118, at 289.

[130] 43 C.F.R. § 86.41(b) (1982).

[131] Wong & Ensor, *supra* note 109, at 373.

[132] Carnes v. Tennessee Secondary School Athletic Ass'n, 415 F. Supp. 569, 571-72 (E.D. Tenn. 1976).

[133] *See supra* note 120.

[134] 411 F. Supp. 1396 (N.D. Ohio 1974).

[135] *Id.* at 1397.

In a later case, *Force v. Pierce City R-VI School District*,[139] the court came to the same conclusion reached in *Clinton* by holding that the individual female plaintiff could not be constitutionally barred from trying out for a position on the football team.[140] The court dismissed the defendants' claim that the rule prohibiting female participation in football was justified for safety reasons.[141] In addition, the court refused to accept the defendants' rather frivolous argument that by banning girls from the sport the school district was maximizing the participation of all students in athletics.[142] The court, in conclusion, remarked:

> [t]here is [no] . . . such thing as a constitutional 'right to try.' But the idea that one should be allowed to try—to succeed or to fail as one's abilities and fortunes may dictate, but in the process at least to profit by those things which are learned in the trying—is a concept deeply engrained in our way of thinking; and it should indeed require a 'substantial' justification to deny that privilege to someone simply because she is a female rather than a male.[143]

Commentators have noted that regardless of whether a complaint is made under the fourteenth amendment or under Title IX, courts consider three factors when faced with an alleged athletic discrimination case.[144] The first factor that a court will consider is whether the sport from which girls are excluded is a contact sport.[145] Second, if the exclusion is from a non-contact sport, the court will examine the quality and quantity of opportunities made available to each sex.[146] The third factor considered is the age of the student athletes and the level of competition in question.[147] The younger the athlete and the lower the level of competition, the less likely a court is to hold that there is justifiable physical or physiological reason for barring girls from the activity.[148]

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[136] Wong & Ensor, *supra* note 109, at 374.

[137] *Clinton*, 411 F. Supp. at 1398.

[138] *Id.* at 1398-99.

[139] 570 F. Supp. 1020 (W.D. Mo. 1983).

[140] *Id.* at 1031-32.

[141] *Force*, 570 F. Supp. at 1028-29.

[142] *Id.* at 1027-29.

[143] *Id.* at 1031.

[144] Wong & Ensor, *supra* note 109, at 353-54.

The problem of sexual discrimination in the context of participation in interscholastic athletic teams is not limited to females. While the vast majority of cases involves females who are excluded from playing on all-male teams, it is not unusual to find instances where the complainant is a male who has been excluded from an all-female team. For instance, occasionally a school will have a girls' team in a certain sport, but no boys' team, and boys will be excluded from participating on the girls' team. The courts are more divided on this issue. A distinct minority of courts have solved this discrimination by permitting the boy athlete to play on the girls' team.[149] For example, the Supreme Judicial Court of Massachusetts in *Attorney General v. Massachusetts Interscholastic Athletic Association*[150] rejected the exclusion of boys from a girls' team, by repudiating the argument that the underlying purpose of the exclusion was the safety of the girls.[151] As noted by the court:

> A girl is surely not less exposed to injury as a member of a predominantly male team, than as one of a team predominantly female but with some male players. In any case, a girl is entitled as much as a boy to choose to take a risk, subject always to safety rules and appropriate supervision and

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[145] *Id.* at 354. Any regulation or rule which totally excludes females from all sports or from any non-contact sport is a violation of equal educational opportunity. *Id.*

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *See, e.g.*, Gomes v. Rhode Island Interscholastic League, 469 F. Supp. 659, 665-66 (D. R.I. 1979)(upholding boys' sex discrimination claim and allowing him to play on girls' volleyball team), *vacated as moot*, 604 F.2d 733 (1st Cir. 1979).

[150] 378 Mass. 342, 393 N.E.2d 284 (1979).

[151] *Id.* at 293-94.

equipment.[152]

Most courts, however, uphold the exclusion of boys from girls' teams.[153] Although the decisions reflect a variety of reasons for upholding the exclusion, a prevalent reason is that all-girl athletic activities are a way of redressing past discrimination against girls in sports.[154] Another rationale relied on by courts faced with this issue is that athletic opportunities for girls are limited and that if boys are allowed to participate, the death knell for those opportunities will be heard. The United States Court of Appeals for the Ninth Circuit in *Clark v. Arizona Interscholastic Association*[155] explicitly held that the policy of excluding boys from participating on girls' athletic teams was a permissible means of attempting to promote equality of opportunity for girls in interscholastic sports and of redressing past discrimination.[156]

While it appears that discrimination in athletics is still fairly rampant, courts continue to be responsive to the constitutional principles involved. As noted by one court:

> The applicability of so fundamental a constitutional principle as equal educational opportunity should not depend upon anything so mutable as customs, usages, protective equipment and rules of play. The courts do not have competence to determine what games are appropriate for the schools or which, if any, teams should be separated by sex. What the courts can and must do is to insure that those who do make those decisions act with an awareness of what the Constitution does and does

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[152] *Id.* at 294.

[153] *See infra* notes 156.

[154] *See, e.g.*, Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126, 1131 (9th Cir. 1982)(holding that governmental interest in redressing past discrimination and in promoting equality between sexes was legitimate and sufficient to warrant classification in high school volleyball), *cert. denied*, 464 U.S. 818 (1983); Forte v. Board of Educ., 105 Misc. 2d 36, 431 N.Y.S.2d 321, 324 (N.Y. Sup. Ct. 1980)(holding that regulation prohibiting male membership on girls' volleyball teams was permissible means of redressing disparate treatment of female students in athletics).

[155] 695 F.2d 1126 (9th Cir. 1982).

[156] *Id.* at 1131-32; *see* Petrie v. Illinois High School Ass'n, 75 Ill. App. 3d 980, 394 N.E.2d 855, 862 (Ill. App. Ct. 1979) (holding that regulation restricting volleyball teams to females was substantially related to governmental objective of maintaining and promoting athletic opportunities for females).

not require of them.[157]

III. CONCLUSION

Important steps have been taken in the last fifteen years towards equal educational opportunities. The development of equal protection theory since 1970 has had far-reaching effects in equalizing the educational opportunities of males and females. Likewise, Title IX's effect has been significant, not in the litigation that it has engendered but in the compliance component of the statute. Unfortunately, sex discrimination still persists in many areas, and much of it has taken on a covert nature.

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[157] *Hoover*, 440 F. Supp. at 171.

AIDS IN THE CLASSROOM

*James A. Keith**

I. INTRODUCTION

AIDS[1] in the classroom is an extremely emotional subject that evokes the extremes in human nature - from understanding to total rejection and even to violence.[2] AIDS in the classroom is not an issue affected only by legal reasoning. In fact, there may be no legal reasoning at all.

Ever since AIDS came onto the scene,[3] educators have been extremely concerned about the legal ramifications involved when a student or employee becomes infected with the AIDS virus. Is it permissible to exclude the person from the classroom? If not, what precautions should be taken by the school? Who should be informed of the individual's condition? What is the right of the public to know of the presence of someone with AIDS in the classroom? What is the liability of the school district if a student (or employee) becomes infected by another student or employee? These and other questions haunt school districts throughout the country, and although courts have begun to lay down some guidelines, the issues have not been completely resolved. This article will attempt to examine the key issues facing school districts when presented with AIDS in the classroom and give the reader an understanding of the direction courts are taking when dealing with this sensitive issue. School districts, thus informed regarding court decisions, will know how to respond when confronted with the AIDS problem.

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[1] "AIDS" is the acronym for Acquired Immune Deficiency Syndrome.

[2] *See generally* Monmaney, *Kids with AIDS*, NEWSWEEK, September 7, 1987, at 51, 52-53 (discussion of dilemma of children with AIDS in school).

[3] Although the first cases of AIDS were reported in 1981 to the Public Health Service's Center for Disease Control, the disease may have appeared as early at 1969. Martinez v. School Bd. of Hillsborough County, 692 F.Supp. 1293, 1294 (M.D. Fla. 1988).

II. Medical Overview of AIDS

AIDS, first diagnosed in this country in 1981, is characterized by a severe breakdown in the body's natural immune system caused by a transmittal agent known as the human T-lymphotropic virus type III (HTLV-III).[4] The disease is growing at an exponential rate worldwide and in the United States. Through March 1988, a total of 84,256 cases of AIDS worldwide had been reported.[5] In the United States, 64,506 cases of AIDS were reported to the Center for Disease Control (CDC) through June 6, 1988.[6] Reports indicate that by 1993, approximately 450,000 cases will have been diagnosed.[7] In Mississippi, with a smaller population of high risk groups, 233 AIDS cases had been reported as of December 2, 1988, over half of whom have already died.[8] This number is up from the 121 cases reported one year earlier.[9]

The term "human immunodeficiency virus" (HIV) has now been accepted as the term used when referring to the AIDS virus, replacing HTLV-III. This virus is a human retrovirus that is different from other viruses by virtue of its chromosome structure and its method of replication.[10] A retrovirus enters into the genetic material and reverses the normal flow of genetic messages. When the virus enters the body, it destroys certain white blood cells called T-lymphocytes, which are an integral part of the human immune system.[11] The result is a weakening of the victim's immune system.

An essential part of the diagnosis of clinical AIDS is the victim's affliction with one or more opportunistic diseases which are not generally seen in persons with normal immune systems.[12] To understand the disease it is necessary to look at the entire spectrum of its development, since AIDS is the third and final stage of the disease process. The first stage occurs when an individual tests positive to HIV antibodies in the blood, but shows no symptoms of the disease.[13] This person is simply a carrier of the virus. The appearance of antibodies can be detected before the noticeable manifestation of any diseases.[14] It is thought that as many as 1.5 million people in this country may be carriers who have no symptoms of any diseases, but it is not known how many of these carriers will develop clinical AIDS.[15] However, even if an HIV-infected person never contracts one or more opportunistic infections, that individual is a carrier and is capable of transmitting the infection to others.[16] The second stage of the disease is referred to as AIDS-related complex (ARC). ARC is characterized by any two symptoms from a list including, but not limited to swollen lymph nodes, weight loss, nights sweats, diarrhea and two symptoms from a variety of laboratory abnormalities.[17] These individuals show some symptoms of an impaired immune system without infection by one or more opportunistic diseases indicative of clinical AIDS.

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[4] *Id.* at 1294-95.

[5] *Update: Acquired Immunodeficiency Syndrome (AIDS) - Worldwide*, 259 J. A.M.A. 3104, 3104 (June 3, 1988).

[6] Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic 2 (June 24, 1988).

[7] *450,000 AIDS Cases Projected by 1993*, The Clarion Ledger, June 5, 1988, at 4a, col. 6.

[8] United States and Mississippi AIDS Statistics, Mississippi State Dept. of Health (Dec. 2, 1988).

[9] United States and Mississippi AIDS Statistics, Mississippi State Dept. of Health (Dec. 31, 1988).

[10] *Martinez*, 692 F. Supp. at 1295.

[11] *Id.*

Although HIV has been isolated in blood, semen, vaginal fluid, saliva, tears, breast milk and urine, the risk of transmission from each of these secretions varies.[18] Blood, semen, vaginal fluid and breast milk are the only body fluids through which transmission has been documented.[19] Transmission by the other body secretions has not been proven to date and remains only a remote theoretical possibility. The only known routes of HIV transmission are sexual intercourse, inoculation with HIV-infected blood, and mother to child in utero, during birth and possibly through breastfeeding.[20]

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[12] *Id.* A variety of definitions have been propounded for AIDS. The CDC defines AIDS as an illness characterized by one or more specific "indicator" diseases in conjunction with certain laboratory evidence of infection. *Revision of CDC Surveillance Case Definition for Acquired Immunodeficiency Syndrome*, 36 Morbidity and Mortality Weekly Rep. 35 (Supp. 1S, August 14, 1987).

[13] *Martinez*, 692 F. Supp. at 1295.

[14] *Id.*

[15] Dept. of Labor, Dept. of Health and Human Services-Joint Advisory Notice: Protection Against Occupational Exposure to Hepatitis B Virus (HBV) and Human Immunodeficiency Virus (HIV), 52 Fed. Reg. 41,818 (Oct. 30, 1987).

[16] Francis & Chin, *The Prevention of Acquired Immunodeficiency Syndrome in the United States*, 257 J. A.M.A. 1357, 1358 (Mar. 13, 1987).

[17] *Martinez*, 692 F. Supp. at 1296.

[18] *See* Francis & Chin, *supra* note 16, at 1358.

[19] *Id.*

The general consensus at this time is that the prospects of a cure for AIDS does not appear to be likely in the foreseeable future.[21] Until such time that a viable treatment can be developed, education appears to be the primary weapon against the spread of this disease.

III. LEGAL RISKS TO SCHOOL DISTRICTS

School districts find themselves in a very difficult situation in dealing with the issue of AIDS. School districts must balance the deprivation of a student or employee of his right to privacy, and in the case of a student, the right to a free public education, versus the public's right to know of conditions in the school that present health hazards.[22] States have statutes allowing school districts to prohibit individuals who have contagious diseases from attending school.[23] However, the Mississippi legislature has not passed legislation specifically addressing AIDS and its impact on schools.[24] Furthermore, Congress has not passed any legislation specifically addressing the problem of AIDS in this country.[25]

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[20] *Id.*

[21] *Martinez*, 692 F. Supp. at 1296.

[22] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 153 (1973) (right to make decisions regarding abortions); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (right to make personal decisions concerning use of contraceptives). Although there is no fundamental right to a free public education, the United States Supreme Court has made it abundantly clear that exclusion of children from schools will not be tolerated. *See* Plyler v. Doe, 457 U.S. 202, 202 (1982) (state statute withholding funds from school districts educating illegal aliens violated fourteenth amendment); Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (educational opportunities provided by state must be made available to all on equal terms). The Mississippi Supreme Court recognizes a fundamental right to a minimally adequate public education. Clinton Mun. Separate School Dist. v. Byrd, 477 So. 2d 237, 240 (Miss. 1985).

[23] *See, e.g.* MISS. CODE ANN. § 37-7-301(h) (Supp. 1988) (excludes from school students with infectious or contagious diseases unless such student presents health certificate that he is free from such disease); *see also* Jacobson v. Massachusetts, 197 U.S. 11, 38 (1905) (state compulsory immunization statute upheld as valid exercise of state police power).

[24] The Mississippi legislature during the 1988 legislative session passed a statute requiring the reporting of cases of communicable diseases. MISS. CODE ANN. § 41-23-1

A. Section 504 of the Rehabilitation Act of 1973.

Although not enacted with AIDS in mind, section 504 of the Rehabilitation Act of 1973 has evolved as the primary source of protection for students and employees of school districts.[26] Section 504 is broad, anti-discrimination legislation prohibiting discrimination against handicapped individuals. It is not limited to students and employees of public school districts, as it applies to the public in general with certain restrictions. Section 504 provides in part as follows:

> No otherwise qualified individual with handicaps in the United States, as defined in Section 706(8) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .[27]

In order to take advantage of section 504, one must show: (1) that he seeks to participate in a program or activity that receives federal financial assistance, (2) that he is handicapped and has been excluded from participating based on that handicap, and (3) that he is "otherwise qualified."[28] Each of these elements requires further examination to determine how section 504 affects schools with respect to the AIDS issue.

By receiving federal funds, public schools clearly meet the first element by qualifying as a program or activity that receives federal financial assistance. The only question prior to this year was whether the entire operation of the school came under the umbrella of section 504 or only the specific program receiving

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(Supp. 1988).

[25] In September, 1988, the House of Representatives passed an AIDS policy bill that calls for, *inter alia*, testing, counseling, confidentiality of test results and expanded research. AIDS Federal Policy Act, H. 3071, 100th Cong., 1st Sess. (1988).

[26] 29 U.S.C.A. § 794 (West Supp. 1988). This law was passed approximately eight years before AIDS was first diagnosed in the United States. *See supra* note 3.

[27] 29 U.S.C.A. § 794 (West Supp. 1988).

[28] *Id.*

federal funds.[29] Congress laid that issue to rest by enacting the Civil Rights Restoration Act of 1987.[30] The Act amended section 504 to include the entire operation of a state or local government, college, university, school, or business if federal financial assistance is extended to any part.[31]

To meet the second element, a person must be handicapped under section 504 in accordance with the following definition:

> [A]ny person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.[32]

This definition was expanded from that originally promulgated to include those individuals who may not presently have an actual incapacity, but who have a past record of impairment or who are regarded as having an impairment.[33]

To determine who is handicapped under section 504, it is necessary to look at the regulations promulgated by the Department of Health and Human Services which define certain key terms. One of those terms, "physical impairment," is defined in part as follows:

> [A]ny physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular, reproductive, digestive; genito-urinary; hemic and lymphatic; skin; and endocrine.[34]

Another key term, "major life activities," is defined as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[35]

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[29] *See* Grove City College v. Bell, 465 U.S. 555, 573 (1984) (education program or activity receiving federal financial assistance was limited to college's financial aid program and did not include entire college).

[30] Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988).

[31] *Id.*

[32] 29 U.S.C.A. § 706(8)(B) (West Supp. 1988).

[33] *See* Southeastern Community College v. Davis, 442 U.S. 397, 405-06 n.6 (1979) (educational institution can require reasonable physical qualifications for admission to clinical training program and thus could refuse to admit individual with hearing disability).

[34] 45 C.F.R. § 84.3(j)(2)(i)(1987).

The final requirement for an individual to come under the protection of section 504 is a determination that he is "otherwise qualified."[36] An analysis of this question is necessary if section 504 is to achieve its objective of protecting handicapped individuals from discriminatory actions while providing the public with assurance that it will not be exposed to significant health and safety risks.

A person is "otherwise qualified" if he can meet all of a program's requirements in spite of his handicap.[37] Thus, an individual who poses a significant risk of transmitting an infectious disease to others in the classroom will not be otherwise qualified to remain in the classroom unless reasonable accommodation will eliminate the risk.[38]

In deciding whether a person is "otherwise qualified," the first step is to inquire about: "(1) the nature of the risk (how the disease is transmitted), (2) the duration of the risk (how long is the carrier infectious), (3) the severity of the risk (what is the potential harm to third parties), and (4) the probabilities the disease will be transmitted and will cause varying degrees of harm."[39] One should defer to the reasonable medical judgments of public health officials in making these findings.[40] The next step is to determine in light of the foregoing whether a school could reasonably accommodate a person with an infectious disease. Accommodation is not reasonable if it imposes "undue financial and administrative burdens" on a school or requires "a fundamental alteration in the nature of the program."[41] Discrimination will not be found where reasonable accommodation does not overcome the effects of a person's handicap or where reasonable accommodation causes undue hardship to the school.[42]

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[35] *Id.* § 84.3(j)(2)(ii)(1987).

[36] *Southeastern Community College*, 442 U.S. at 406.

[37] *Id.*

[38] Doe v. Dolton Elementary School Dist. No. 148, 694 F.Supp. 440, 445 (N.D. Ill. 1988). A pre-teen student with AIDS was granted an injunction allowing him to attend school as long as he complied with certain requirements laid down by the court. *Id.* The court prohibited him from engaging in contact sports, required him to have monthly medical examinations performed by his doctor and weekly examinations performed by the school nurse and required his parents to report immediately to the school district any open lesions or illness. *Id.*

[39] School Bd. of Nassau County v. Arline, 480 U.S. 273, 288 (1987).

[40] *Id.*

B. Application of Section 504 by Courts

In view of the foregoing analysis, how has section 504 become the primary law involving the issue of AIDS? Ironically, *School Board of Nassau County v. Arline*,[43] the most important case bearing on this question, is not an AIDS case, but a tuberculosis case. Arline, an elementary school teacher, was discharged after several reoccurrences of tuberculosis. She brought suit alleging she was handicapped under section 504 and that she was otherwise qualified since the risk of infection to her students was minimal. The United States Supreme Court held that Arline was handicapped under section 504 because her hospitalization established a record of impairment and her impairment had substantially limited her major life activities.[44] Due to a lack of factual findings by the district court, the case was remanded to determine whether Arline was otherwise qualified for her job. Based on extensive medical testimony, the district court, upon remand, concluded that Arline posed no risk to the students as she was cured of tuberculosis and, therefore, was entitled to reinstatement to her position as teacher.[45]

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[41] *Southeastern Community College*, 442 U.S. at 410. Factors to be considered in determining whether accommodation would cause undue hardship include:

> (1) The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget;
> (2) The type of recipient's operation, including the composition and structure of the recipient's workforce; and
> (3) The nature and cost of the accommodation needed.

45 C.F.R. 84.12(c)(1985).

[42] *Southeastern Community College*, 442 U.S. at 410-13; *see* Alexander v. Choate, 469 U.S. 287, 289 (1985) (effect on handicapped of state's reduction in annual inpatient coverage held not cognizable under § 504); Strathie v. Department of Transp., 716 F.2d 227, 231 (3d Cir. 1983) (reasons advanced by state in support of hearing requirements for obtaining driver's license not violative of Rehabilitation Act); 45 C.F.R. pt. 84, App.A, p. 350 (1985) (recipient of federal financial assistance required to make reasonable accommodation to physical or mental limitations of handicapped individual unless demonstration made of undue hardship).

[43] *Arline*, 480 U.S. at 289.

[44] *Id.* at 281.

Although *Arline* did not involve AIDS, it clearly held that "[a]llowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of section 504. . . ."[46] Thus, persons with AIDS, those in whom the disease has progressed to a point where opportunistic diseases have developed and have substantially impaired one or more major life activities, meet the definition of handicapped under section 504. Likewise, those individuals with ARC, who have disabling physical effects caused by the HIV infection, qualify as handicapped under section 504. Assuming theses individuals are otherwise qualified, contagiousness does not justify discrimination based on their handicap with AIDS or ARC.

The *Arline* court did not hold that a person with an active, contagious disease would be allowed in the classroom.[47] In fact, the court's decision is clear that a person who poses a significant risk of transmitting an infectious disease in the classroom will not be otherwise qualified if reasonable accommodation is not possible.[48]

What has been the result when courts have specifically addressed cases involving AIDS? A pre-*Arline* case held that a kindergarten student infected with AIDS was handicapped under section 504 because of significant impairment of his major life activities.[49] The court examined voluminous medical and scientific evidence and determined that the student posed no risk of harm to his fellow students and teachers and thus was otherwise qualified to attend class.[50]

Another important case involved three hemophiliac brothers who tested HIV-positive but did not have clinical AIDS.[51] No opportunistic diseases had afflicted the three brothers. When the school district would not allow the boys to be admitted to school, they sued asking for a preliminary injunction to be allowed to attend school. The court, relying on medical science as it presently existed, and without yielding to community fear and parental pressure, granted the injunction, basing its decision in part on the belief that the brothers in all likelihood would prevail on the merits of the case.[52] While allowing the brothers to attend school, the court emphasized the responsibility of the brothers to protect themselves and the school population from the risk of exposure to HIV infection.[53]

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[45] Arline v. School Bd. of Nassau County, 692 F.Supp. 1286, 1293 (M.D. Fla. 1988).

[46] *Arline*, 480 U.S. at 284. Although it is clear under *Arline* that an individual with AIDS or ARC would be protected by § 504, it is not clear whether *Arline* would afford the same protection to an asymptomatic carrier of the AIDS virus. The court in *Arline* specifically refused to consider whether a carrier of the AIDS virus was physically impaired or handicapped under § 504. *Id.* at 282 n. 7.

[47] *Id.* at 287 n.16.

[48] *Id.*

[49] Thomas v. Atascadero Unified School Dist., 662 F.Supp. 376, 381 (C.D. Cal. 1987).

[50] *Id.* at 382.

[51] Ray v. School Dist. of DeSoto County, 666 F.Supp. 1524, 1528 (M.D. Fla. 1987).

In a case involving a teacher with AIDS, the school district attempted to skirt the problem by reassigning the teacher to an administrative position at the same rate of pay and benefits.[54] The teacher refused the offer and asked for injunctive relief to be placed back in his teaching position. Relying on extensive medical evidence and earlier court decisions, the court of appeals found that there was no significant danger to other persons in the school environment and that the teacher would in all probability succeed on the merits.[55] Further, the court reasoned that the teacher, although not monetarily injured, would be irreparably injured if removed from his job of teaching hearing-impaired children in a classroom setting.[56] Recognizing the public interest in this case, the court nonetheless refused to base its decision on the fear and apprehension of others.[57] The court did not stop at that point. It charged the district court with establishing reasonable procedures to monitor the teacher's condition to insure that no significant risk of harm would arise in the future as long as the teacher remained in the classroom.[58]

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[52] *Id.* at 1536.

[53] *Id.* at 1537. The Ray brothers were required to cover all sores and lesions while in school, maintain a high standard of hygiene, avoid contact sports and avoid all incidents at school that might result in the spill of blood or other body fluids. *Id.* Unfortunately, the court's ruling did not stop the fear, apprehension and paranoia created in the community where the Ray brothers lived. *See* Monmaney, *supra* note 2, at 52. Approximately half of the student body boycotted classes, citizens rallied, bomb threats were made against the school and a suspicious fire destroyed the Ray home. *Id.* The Rays were forced to move to another community. *Id.* The Rays filed a civil action against the school district for barring them from the classroom. In a widely publicized settlement, the district agreed to pay a $1.1 million award to the Ray brothers and their parents. *Judge: $1.1 Million Settlement in AIDS Case Should Teach Schools Lesson* (LEXIS, News Library, AP file)(Sept. 30, 1988). An interesting postscript to this case is that when the Rays moved, they relocated about fifty miles from their original home where they continue to live and attend school without incident. *Id.*

[54] Chalk v. United States Dist. Court Cent. Dist. of Cal., 840 F.2d 701, 703 (9th Cir. 1988).

[55] *Id.* at 708-09.

[56] *Id.* at 709-10.

Do the foregoing cases mean that a court will never prevent a child with AIDS from obtaining his education in the classroom? Apparently not, because a United States District Court recently refused to grant an injunction admitting a six-year old trainable mentally handicapped student diagnosed with ARC to a special education class.[59] Because the student was incontinent and kept her finger and thumb in her mouth, and because of clearly divided expert medical evidence, the court found that the plaintiff did not carry its burden of establishing its likelihood of prevailing on the merits.[60]

By the time *Martinez* was heard on the merits, the student had developed AIDS.[61] Concentrating on the nature of the risk and the probabilities of transmission, the trial court found that since the student was incontinent and sucked her thumb and forefinger continuously, totally unrestricted placement in a trainable mentally handicapped (TMH) class was inappropriate.[62] Neither could the court find that placement in a homebound program was appropriate.[63] Instead, it held that the student should be placed in the TMH class, but only under certain conditions, limitations and restrictions. Those requirements included the construction of a separate room inside the classroom, with a sound system, large picture window and a full-time aide to remain in the room with the student. The student was required to attend school in this room as long as her condition remained unchanged.[64]

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[57] *Id.* at 711.

[58] *Id.*

[59] Martinez v. School Bd. of Hillsborough County, 675 F.Supp. 1574, 1585 (M.D. Fla. 1987).

[60] *Id.*

[61] *Martinez*, 692 F.Supp. at 1300.

[62] *Id.* at 1304.

[63] *Id.*

Obviously not satisfied with the district court's ruling, Martinez appealed to the Eleventh Circuit Court of Appeals.[65] The appellate court ruled that the trial court's conclusions concerning risks of transmission (that only a remote theoretical possibility of transmission existed through tears, saliva and urine) were insufficient to exclude Martinez from her classroom.[66] Since the trial court failed to make findings with respect to the overall risk of transmission from all bodily fluids, the case was remanded.[67] According to the court of appeals, such findings were necessary to determine whether Martinez was otherwise qualified.[68] Since Martinez was handicapped under the Education of All Handicapped Children Act,[69] in addition to section 504, the trial court was further directed to hear evidence concerning the effect any reasonable accommodation might have on her psychological and educational development.[70]

In light of the foregoing cases, it appears that absent unique circumstances, individuals with AIDS or ARC will be allowed to be present in the classroom. *Martinez* indicates that the circumstances will indeed have to be very unique.[71] But what about individuals who are asymptomatic carriers of HIV and have no outward appearance of the disease, an issue that was sidestepped by the Supreme Court in *Arline*? Does an asymptomatic carrier meet the definition of handicapped under section 504, a question requiring an analysis of whether such an individual (1) has a physical impairment that limits one or more of his major life activities, (2) has a record of impairment, or (3) is regarded as being impaired?[72]

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[64] *Id.* at 1305-06.

[65] Martinez v. School Bd. of Hillsborough County, 861 F.2d 1502 (11th Cir. 1988).

[66] *Id.* at 1506.

[67] *Id.*

[68] *Id.*

[69] 20 U.S.C. §§ 1400-1485 (1986). The Education of All Handicapped Children Act (EHA) defines handicapped children as children who are "mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related service." *Id.* § 1401(a).

[70] *Martinez*, 861 F.2d at 1506.

[71] *Id.* at 1503. Eliana Martinez is a seven year old trainable mentally handicapped child with an I.Q. of 41. *Id.* She is in the late stages of AIDS, is not toilet trained, suffers from thrush, sucks her thumb and forefinger and in the past has had skin lesions. *Id.* In spite of the CDC's recommendation that such children should probably remain outside the classroom, the appellate and district courts still struggle with whether Martinez is otherwise qualified to attend school. *Id.*

Unfortunately, there is a dearth of cases that have specifically addressed this issue. The *Ray* court, although dealing with asymptomatic carriers of the AIDS virus, granted the Rays' request for injunctive relief because of the absence of legal precedence supporting exclusion from the classroom and without addressing the issue of whether asymptomatic carriers are handicapped under section 504.[73] However, another post-*Arline* court used *Arline*'s analysis and held that an HIV-infected individual was handicapped since he was perceived to be by others.[74]

The most significant development concerning whether asymptomatic HIV carriers are protected by section 504 was the recent position taken by the United States Department of Justice that such carriers are protected the same as those diagnosed with AIDS or ARC.[75] This conclusion was reached by examining the three-part question required by section 504. First, by relying on the views of the Public Health Service of the United States, the Department found that a person with HIV infection is clearly impaired.[76] The question concerning limits on major life activities was more difficult to answer because in many instances asymptomatic HIV infected individuals appear to have no disabling physical effects from this infection.[77] However, the Department recognized that activities such as procreation and intimate personal relations would be substantially limited.[78] Even if a factual question existed concerning whether there was a physical impairment, the Department pointed out that an alternative rationale for finding a limitation on major life activities might be based on the reaction of others to the infection.[79] Relying on *Arline, Southeastern Community College* and *Doe v. Centinela Hospital*, the Department determined that an HIV-infected individual is handicapped under section 504 because he will be perceived as handicapped by others.[80]

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[72] 29 U.S.C.A. § 706 (7)(B)(West Supp. 1988).

[73] *Ray*, 666 F.Supp. at 1534-38.

[74] Doe v. Centinela Hospital, Civ. 87-2514, 57 U.S.L.W. 2034 (C.D. Cal. June 30, 1988) 1988 WL 81776 (Westlaw, Allfeds library).

[75] Gen. Couns. Mem. 88-398 (Oct. 6, 1988), Opinion by Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, U.S. Dept. of Justice. This opinion differs from the position taken by the Department of Justice in an opinion dated June 20, 1986, written by Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel in answer to a request by the General Counsel for the Department of Health and Human Services. *Id.* at 2 n.4. In the 1986 opinion, the Justice memorandum held that an individual was not handicapped under § 504 solely because he was a carrier of the AIDS virus. The Department's opinion was that an employer did not discriminate if the employer took action against an employee based on the fear of an individual's contagiousness. The Department apparently changed its position after subsequent legal developments, such as the *Arline* decision, passage of the Civil Rights Restoration Act and subsequent medical developments. *Id.* at 3 n.4.

[76] *Id.* at 8-9.

C. *Protection under Education for All Handicapped Children Act*

Does the Education of All Handicapped Children Act (EHA)[81] provide protection to a student who has AIDS, ARC or is HIV-infected?[82] That question was recently answered by a district court which concluded that EHA would apply to a student who is diagnosed with any of the categories of AIDS only if the student's physical condition adversely affected his educational performance.[83] Under EHA's definition of a handicap, an HIV-infected student would have to come under the category of "other health impaired."[84] But simply being categorized as "other health impaired" is not sufficient since the impairment, infection with HIV, must also affect the student's ability to learn and perform in the classroom.[85] Thus, simply because a student has AIDS, ARC or is HIV-infected will not bring him under the umbrella of EHA. However, since AIDS is a progressive disease, an HIV-infected student may change from unprotected status under EHA to being protected by that Act. In that event, the substantial procedural requirements under EHA will give the HIV-infected student even greater protection from being excluded from the classroom.

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[77] *Id.* at 9.

[78] *Id.* at 10-11.

[79] *Id.* at 11-12.

[80] *Id.* at 12-15.

[81] Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400-1461 (1982)).

[82] *Id. See supra* note 69 (definition of handicapped children under EHA).

[83] Doe v. Belleville Public School Dist. No. 118, 672 F.Supp. 342, 345 (S.D. Ill. 1987).

[84] *Id.*

[85] *Id.*

IV. OTHER MAJOR ISSUES FACING SCHOOL DISTRICTS

A. *Confidentiality*

Although exclusion from the classroom is the most controversial issue facing school districts, no less important is the concern with confidentiality. The Family Educational Rights and Privacy Act of 1974 (FERPA) requires recipients of federal funding to maintain confidentiality of education records.[86] The medical records of a student clearly would be protected by this statute and cannot be disclosed without the consent of the parents. Thus, a student's HIV status cannot be revealed without consent. Furthermore, the statutory protection for handicapped children would prevent disclosure of a handicapped student's condition relative to AIDS.[87]

Does this mean that no one in the school district should be told of an individual's infection with HIV? To the contrary, it is very important that someone in the school district be aware of who is infected with HIV, not only to protect uninfected persons, but to protect the infected individual from exposure to other infectious diseases such as measles and chicken pox.[88] Because of a compromised immune system, such diseases could be fatal to the HIV-infected person.

The Centers for Disease Control (CDC) have issued a number of guidelines dealing with the prevention of the spread of

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[86] Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232(g) (1982) (also called Buckley Amendment).

[87] 29 U.S.C. § 794 (Supp. 1986); 20 U.S.C. § 1412 (2) (D) (1982); 20 U.S.C. § 1417(c) (1982).

[88] Regulations to FERPA provide for the following three exceptions to the prohibition against disclosure that may apply: (1) treatment records of students eighteen years of age or older are not included in the definition of education records; (2) records may be disclosed to the appropriate parties in connection with an emergency if the information is necessary for the protection of the health or safety of others; (3) records may be disclosed to appropriate school officials who have legitimate educational interests. 34 C.F.R. §§ 99.3(b)(4)(iii), 99.31(a)(1), 99.36(a)(1987).

AIDS in the classroom environment.[89] Recognizing the need for confidentiality and the right to privacy for those infected with HIV, the CDC recommends that decisions involving the educational placement of HIV-infected students should be made using the team approach, which would include school personnel directly associated with the proposed educational setting.[90] This presumably would mean the school teacher, school nurse and possibly school principal.

Endorsing the CDC's guidelines, the Mississippi State Board of Education on June 24, 1988 adopted guidelines for dealing with HIV infection in the educational setting.[91] The guidelines, patterned after those adopted by the CDC, recommend the team approach concerning the appropriateness of school attendance or employment of HIV-infected persons, including school officials on the team. The guidelines further recommend that the number of persons who are made aware of the individual student's or employee's condition be limited only to those who are required to insure proper care of the infected person and who are needed to detect and control situations where risk of transmission might exist.[92] The model policy adopted by the Board recommends that the local school district should take extreme care not to disclose any information that would lead to the identification of the HIV-infected person.[93]

Although it is clear that a school district cannot reveal publicly the identification of the HIV-infected person present in the classroom, the question remains whether a school district can announce the fact that an individual in the district is HIV-infected without giving specific information.[94] Presumably, school districts might desire to take this action under pressure from parents who want to be able to decide whether their child goes to school with an HIV-infected person. Of course, to announce that an individual in the district is HIV-infected would only lead to additional pressure from parents who want to know more detailed information, such as the particular school and specific class the student attends. Since any information provided by the district may lead to the identification of the individual, a lawsuit will most assuredly result, with the school district trying to prove that its information did not lead to the identification of the HIV-infected person.

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[89] *Education and Foster Care of Children Infected with Human T.-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus*, 34 MORBIDITY AND MORTALITY WEEKLY REP. 519-20 (Aug. 30, 1985).

[90] *Id.*

[91] *Guidelines for Dealing With HIV Infection and Model Communicable Disease Control Policy With Considerations When Developing a District Communicable Disease Control Policy*, Mississippi Department of Education, June 17, 1988.

[92] *Id.* at H1.

[93] *Id.* at C2.

[94] *See Education Daily*, 2 (July 25, 1988)(parents of child with AIDS filed suit against school system over policy of notifying all parents when child who is HIV-infected enrolls in school).

School boards should be extremely careful because of the risk of a privacy right violation where the medical condition of an employee is revealed to a third party. This issue was raised in a case involving a school teacher whose medical insurance form identifying him with having AIDS was negligently sent to his employer, causing him to lose his job temporarily.[95] The tort of invasion of privacy resulting from disclosure of a true fact requires a showing that the fact was private, that it was sensitive personal information, not ordinarily disclosed, that it would be highly offensive to the persons learning the disclosed information, and that disclosure was not of legitimate concern to the public.[96] An employer who releases information that an employee has AIDS is risking a suit alleging invasion of privacy.[97]

B. Testing

A question frequently asked by school districts is whether a district can require an employee or student to be tested where it suspects the individual is HIV-infected. Although regulations under section 504 do not prohibit per se pre-employment blood testing for AIDS, an employer is not allowed to conduct a pre-employment medical examination or make pre-employment inquiry of whether a job applicant is handicapped or inquire about the nature or severity of a handicap.[98] An employer may require pre-employment tests that are job-related.[99] Thus, an employer could require pre-employment tests for HIV if it can be shown the test is job-related. An employer may condition an offer of employment on the results of a medical examination conducted before the employee begins his job, provided the examination is routinely given to all new employees and the results are used in accordance with section 504.[100] Thus, a teacher who tests positive for HIV could not be refused employment if he is otherwise qualified to perform the job.[101] Although regulations to section 504 address only pre-employment examinations, it is safe to assume the same standards apply to medical examinations that are required during the course of employment.

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[95] Hartog-Rapp, *AIDS Poses Legal Risks for School Boards*, 40 Educ. Law Rep. 1121, 1132 (1987).

[96] Restatement (Second) of Torts § 652D (1976).

[97] *See* Burris v. South Central Bell Tel. Co., 540 F.Supp. 905, 910 (S.D. Miss. 1982) (cause of action for invasion of privacy based on unreasonable intrusion into one's private affairs requires pattern of harassment or communication of vicious nature).

In addition to section 504 constraints, there are serious legal problems with HIV testing of public employees under the fourth amendment. Unreasonable searches and seizures are prohibited by the fourth amendment where there is an infringement of "an expectation of privacy that society is prepared to consider reasonable."[102] Courts have determined that a compulsory blood test in the public sector constitutes a search and seizure.[103] The standard for determining whether the search is justified calls for a court to look at the "nature and quality of the intrusion on the individual's fourth amendment interests against the importance of the governmental interest alleged to justify the intrusion."[104]

Applying the *O'Connor* standard, the Nebraska Supreme Court, in *Glover v. Eastern Nebraska Community Office of Retardation*,[105] found that such tests constituted an illegal search and seizure. In *Glover*, the Eastern Nebraska Human Services

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[98] 45 C.F.R. § 84.14(a) (1987).

[99] *Id.*

[100] *Id.* § 84.14(c).

[101] *See supra* notes 36-42 and accompanying text.

[102] O'Connor v. Ortega, 480 U.S. 709, 715 (1987)(quoting United States v. Jacobsen, 466 U.S. 109, 113 (1984)).

[103] Schmerber v. California, 384 U.S. 757, 767 (1966).

[104] *O'Connor*, 480 U.S. at 719, (quoting United States v. Place, 462 U.S. 696, 703 (1983)).

[105] Glover v. Eastern Neb. Community Office of Retardation, 686 F. Supp. 243 (D. Neb. 1988).

Agency adopted an infectious disease policy requiring certain employees to be tested at least annually for tuberculosis, hepatitis and HIV.[106] These employees worked for a division of the Agency providing residential, vocational and specialized services for the mentally retarded.[107] Persons served by the organization ranged from mild to the profound level of retardation and sometimes exhibited violent behavior.[108] The policy was enacted after an employee, who had been bitten, scratched, pinched, kicked and hit by patients, died from AIDS.[109] Relying on medical testimony that the risk of transmission from an HIV-infected employee to a patient was so minuscule that it was almost zero, the *Glover* court found that the policy was not required to protect patents from medical risks and, therefore, constituted an illegal search and seizure in violation of the fourth amendment.[110] The policy was simply too broad to justify its infringement on the employees' right to privacy.[111]

Although HIV testing has been upheld in very specific situations,[112] the risk of contagion in the classroom is so minimal that testing of students and school personnel will be found violative of the individual's constitutional protection.[113]

Another problem facing a school district in the area of blood testing could be the possible liability for failure to inform an employee who tests HIV-positive. An employee may be entitled to rely on the expectation that his employer will inform him of any dangerous condition discovered by the test.[114] In addition, and a more difficult question, is whether a duty exists for an employer to disclose to the spouse of an employee that the employee has tested positive for HIV. A spouse might claim that the employer, armed with knowledge of a dangerous condition, had a duty to inform her because of the likelihood she would contact HIV by engaging in sexual relations with her husband.[115] This issue has not been fully addressed by the courts, but it has the potential for tremendous liability for employers who insist on testing its employees. In view of the fact that an employer such as a school district cannot deny employment based on positive HIV tests alone, testing appears to be of no value to the district. On the other hand, information learned from testing may place a higher duty on the district and expose it to a myriad of legal problems.

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[106] *Id* at 245.

[107] *Id.*

[108] *Id.*

[109] *Id.* at 247.

[110] *Id.* at 251.

[111] *Id.*

[112] Local 1812, Am. Fed. of Gov't Employees v. United States Dept. of State, 662 F.Supp. 50 (D.D.C. 1987). In *Local 1812,* the court allowed the Department of State to expand its medical fitness program for all foreign service workers to include HIV testing. *Id.* at 54. Focusing on the employee's fitness for duty in a specialized government agency, the court found that the HIV test was rational and closely related to fitness for duty. *Id.* at 53. The court gave weight to the fact that the employees would be placed in foreign posts where medical facilities were inadequate to diagnose and treat problems that might arise in an HIV-infected person. *Id.* at 54. Recognizing that an HIV-infected employee is covered by § 504, the court nonetheless held that such individuals were not otherwise qualified for foreign service duty. *Id.*

[113] *Glover*, 686 F.Supp. at 250-51.

C. Labor Issues

Can employees of a school district refuse to teach an HIV-infected student or work with HIV-infected personnel? The National Labor Relations Act provides employees with the right to engage in concerted activities for their mutual aid or protection.[116] Concerted activity by an employee must be with or on behalf of other employees and not by himself or on his own behalf.[117] In order for an employee to protest against a perceived dangerous condition in the work place, such as another employee's HIV-infected condition, the employee must have a good faith reasonable belief that a dangerous condition exists.[118] Thus, if employees have a good faith reasonable belief that they risk infection by working with an HIV-infected person, their refusal to work with such an individual may be protected activity. However, an employer, by educating its employees about AIDS and its methods of transmission, could show that the employee's fears were unreasonable and thus not protected.[119]

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[114] *See* Union Carbide and Carbon Corp. v. Stapleton, 237 F.2d 229, 232 (6th Cir. 1956) (employer who required periodic medical examinations of employees had duty to disclose to employee that he was suffering from tuberculosis).

[115] *See, e.g.*, Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 25, 551 P.2d 334, 343-44, 131 Cal. Rptr. 14, 23-24 (1976)(psychotherapist who determined that patient presented serious danger of violence to another incurred obligation to use reasonable care to protect victim).

[116] National Labor Relations Act, 29 U.S.C. § 157 (1982).

[117] *Id.*

[118] *See* Johnson-Stewart-Johnson Mining Co., Inc. v. Martorana, 263 NLRB Dec. (CCH) ¶ 15,089 (1982).

V. Conclusion

As this article points out, there is a maze of legal issues surrounding student and employee rights with regard to AIDS in the classroom. Other legal theories are being identified to protect those infected with HIV. With the tremendous increase in AIDS cases, the problems associated with AIDS in the classroom will not go away but will continue to grow. Schools must take an aggressive role in educating the public, parents and students with respect to AIDS and the risk of transmission in the school environment. Only when the public has such an understanding will school boards be able to protect the rights of infected individuals and adopt policies enabling the board to address each situation without the fear and paranoia so often prevalent in each case.

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[119] Gateway Coal Co. v. United Mine Workers of America, 414 U.S. 368 (1974).

RECENT DECISIONS

CONSTITUTIONAL LAW — PROCEDURAL DUE PROCESS — WHERE SCHOOL BOARD HAS CONSIDERED ONLY LISTED CHARGES IN EXPULSION PROCEEDINGS, THE BOARD'S FAILURE TO INFORM STUDENT OF ADDITIONAL ALLEGATIONS OR TO GIVE STUDENT THE OPPORTUNITY TO CONFRONT ACCUSERS WILL NOT CONSTITUTE DENIAL OF PROCEDURAL DUE PROCESS

Plaintiffs[1] filed a complaint in chancery court[2] against defendant school Board of Trustees[3] appealing the plaintiffs' expulsion from school and seeking reinstatement.[4] The defendant had expelled[5] the plaintiff following an evidentiary hearing.[6] Since students making allegations additional to those of which the plaintiff had formal notice[7] did not appear at this hearing,[8] plaintiffs alleged that the Board's failure to inform them of the additional allegations or give them an opportunity to confront the students making those allegations constituted a denial of procedural due process.[9] Plaintiffs also maintained that the defendant had insufficient evidence to support the expulsion.[10] The defendant, arguing that plaintiffs indeed had notice of the non-listed charges,[11] maintained that it had not considered the students' additional allegations.[12] The trial court affirmed the expulsion.[13] On appeal, the Mississippi Supreme Court, *held*, affirmed.[14] Where it is not clear

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[1] Plaintiffs were Regina Jones, the student, and her parents, Mr. and Mrs. Marvin L. Jones. Jones v. Pascagoula Mun. Sep. School Dist., 524 So. 2d 968 (Miss. 1988).

[2] *Id.* at 970. Plaintiffs filed the complaint in the Chancery Court of Jackson County. *Id.* Subsequently, plaintiffs filed a motion to strike from the record of the Board of Trustees' hearing the transcripts of disciplinary hearings of nine other students. *Id.*

[3] *Id.* at 969. Plaintiff attended William M. Colmer Junior High School in the Pascagoula Municipal Separate School District. *Id.*

[4] *Id.* The suspension process began on January 20, 1986, when the Board's Disciplinary Review Committee held a hearing regarding alleged drug involvement on campus. *Id.* At this hearing, an assistant principal at William M. Colmer Junior High School stated that nine of ten students he had spoken with said Regina Jones was distributing drugs. *Id.* The committee recommended expulsion of the plaintiff for the remainder of the 1985-86 school year. *Id.* Plaintiffs appealed this decision to the school superintendent who reviewed the record and recommended to the Board of Trustees that it expel the plaintiff. *Id.*

[5] *Id.* at 970. Under the Mississippi Code, a school board of trustees has authority "to suspend or expel a pupil for misconduct in the school, upon school buses, on the road to and from school, during recess or upon the school playgrounds. . . ." MISS. CODE ANN. § 37-7-301(e) (1972).

[6] *Jones*, 524 So. 2d at 969. Counsel represented plaintiffs at the Board hearing. *Id.* Two students, Brandon Winstead and Sean Dixon, testified that the plaintiff had given Winstead ten valium tablets at her house after school. *Id.* Another student, Brandon

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Erwin, testified that he received a valium tablet from the plaintiff in a school hallway. *Id.* Erwin's sister, Tasha, told the Board the plaintiff had given "Brandon" a pill. *Id.* Although the record was vague, it appeared Tasha meant Brandon Winstead and not her brother, Brandon Erwin. *Id.* Plaintiff denied any involvement in distributing drugs. *Id.* at 970. She suggested that some of her accusers had reasons for wanting to get her into trouble. *Id.* In fact, three of the students did not accuse the plaintiff of drug distribution until after the plaintiff had turned them in for drug possession. *Id.* According to the plaintiff's mother, these students repeatedly telephoned the plaintiff and threatened to "get [her] for turning [them] in." *Id.*

[7] *Id.* at 972. Prior to the Board hearing, the Board gave plaintiffs notice only of charges concerning the distribution of ten valium tablets. *Id.* At the hearing, the school's principal testified that three female students, Stacey Mixon, Patricia Dean, and Tammy Dean, stated they had received the drug Vivarin from the plaintiff. *Id.* Plaintiffs argued that the Board should have given them a list of these witnesses and an opportunity to cross-examine them. *Id.* at 973. The trial court allowed transcripts of the separate disciplinary review hearings of these three students, as well as those of six others, to be included in the record. *Id.* at 970.

[8] *Id.* None of the students making the Vivarin allegations appeared at the hearing. *Id.* at 969.

[9] *Id.* at 971. Plaintiffs requested Brandon Erwin and two other students who had testified about the valium distribution allegations before the Disciplinary Review Committee to appear at the Board meeting. *Id.* at 973. These students appeared and were cross-examined by plaintiff's counsel. *Id.*

[10] *Id.* at 970. Plaintiffs argued that evidence concerning the distribution of ten valium tablets to Winstead did not support a violation of any school rule since the incident occurred "off campus and not during school hours." *Id.* Plaintiffs maintained that since the testimony relating to drug distribution at school was conflicting, then this evidence was insufficient as well. *Id.* at 971.

[11] *Id.* at 971. The record disclosed that the plaintiffs' counsel knew that nine students had accused Regina, having questioned both principal and assistant principal concerning them. *Id.*

[12] *Id.* at 972. Nothing in the record of the Board hearing indicated that the Board considered the accusations involving the sale of Vivarin. *Id.*

[13] *Id.* at 970. In affirming the expulsion, the trial court also overruled the plaintiffs' motion to strike from the record the transcripts of the separate disciplinary review hearings of the other nine students. *Id.*

[14] *Id.* at 973. Plaintiffs suggested the appeal was moot since Regina had completed

that a school board has considered anything other than listed charges in making the decision to expel a student, and where there is sufficient evidence that the student has violated school policy, failure to inform the student of additional allegations or to give the student the opportunity to confront those accusers would not substantially prejudice the student so as to deny due process. *Jones v. Pascagoula Mun. Sep. School Dist.*, 524 So. 2d 968 (Miss. 1988).

Though recognition of an individual's right to be advised of the nature and basis of accusations against him can be traced to the Bible,[15] the Magna Carta set forth the earliest recorded expression of the concept of procedural due process in English law.[16] Edward III first chose to use the expression "due process of law"[17] to describe procedural safeguards in his formal confirmation of the Magna Carta.[18] Language reminiscent of both the Magna Carta and Edward III's provision appeared in early American colonial laws[19] as well as in the American Bill of Rights, which adopted the concept of due process of law in reference to actions taken by the federal government.[20] The Reconstruction Congress copied the language of the fifth amendment in drafting the fourteenth amendment,[21] which was meant to act as a similar re-

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the 1986 spring semester while the appeal was pending. *Id.* at 970. The court disagreed, finding that upholding of the plaintiff's expulsion would result in the nullification of her credit for the spring semester. *Id.* This potential loss of school credit was sufficient to present an actual controversy. *Id.*

[15] The Bible provides: "It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have license to answer for himself concerning the crime laid against him." *Acts* 25:16.

[16] H. MEYER, THE HISTORY AND MEANING OF THE FOURTEENTH AMENDMENT 128 (1977). The Magna Carta proclaimed that no man would be imprisoned "except by the judgment of his peers and by the law of the land." *Magna Carta*, chap. 39 (1215).

[17] 28 Edw. 3, c. 1, 3 (1354). While not using the phrase "by the law of the land," Edward III promised "[t]hat no man of what state and condition that he be shall be ousted from his land nor from his tenement, nor taken, nor imprisoned, nor disinherited, nor put to death without being brought in answer by due process of law." *Id.*

[18] *See* H. MEYER, *supra* note 16, at 134-35 (Edward III's confirmation included "Great Charter" and Charter of Forest, in addition to other statutes utilized prior to his time).

[19] *Id.* at 140. An example of this trend appeared in New York's Charter of Liberties and Privileges of 1683, which included a clause resembling chapter 39 of the Magna Carta, and a clause modeled after Edward III's due process provision. *Id.* at 140-41.

[20] U.S. CONST. amend. V. The applicable text of the fifth amendment states: "No person shall. . .be deprived of life, liberty, or property, without due process of law. . . ." *Id.*

[21] *Id.* at amend. XIV, § 1. The fourteenth amendment states in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." *Id.*

straint on actions of the individual state governments.[22]

Courts have established that the fourteenth amendment protects the rights of individuals from state action, including actions of a school board.[23] Students' rights, however, had played an insignificant role in school and college disciplinary actions[24] until the Fifth Circuit's landmark decision in *Dixon v. Alabama State Board of Education*.[25] The plaintiffs in *Dixon* were students at a tax-supported college, expelled[26] without having formal charges placed against them and without being afforded a hearing prior to their expulsion.[27] Recognizing the importance of education,[28] the Fifth Circuit Court of Appeals held that due process required notice of the specific charges against the student[29] and some opportunity for a hearing prior to the expulsion.[30] The court explained that the type of hearing required should vary depending on the particular circumstances of the case.[31] Where expulsion is involved, the court concluded that the student should receive a list of witnesses against him and the substance of their testimony.[32] The court added that the student also retained the opportunity to present a defense against the charges.[33]

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[22] H. MEYER, *supra* note 16, at 125-26. The procedural aspect of due process mandates that when governmental power is to be used against an individual, there exists a right to an objective procedure to ascertain "the basis for, and legality of such action." J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW § 13.1 at 452 (3d ed. 1986).

[23] West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943). In *Barnette*, the Supreme Court held that a state board of education's action making it compulsory for public school children to salute the flag and pledge allegiance violated first amendment principles protected through the due process clause of the fourteenth amendment. *Id.* at 639. *See also* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969) (students retain constitutional rights at school); Cooper v. Aaron, 358 U.S. 1, 16-17 (1958) (state management of segregated schools not consistent with fourteenth amendment protection); Brown v. Board of Educ., 347 U.S. 483, 495 (1954) (school board's segregation of children in public schools violative of fourteenth amendment protection).

[24] *See, e.g.*, People *ex rel.* Bluett v. Board of Trustees, 10 Ill. App. 2d 207, 134 N.E.2d 635, 637 (1956) (student expelled for cheating not entitled to formal hearing at which she would be confronted by witnesses and given opportunity to cross-examine); Morrison v. City of Lawrence, 181 Mass. 127, 63 N.E. 400, 401 (1902) (student should have opportunity to be heard but school need not require other students to testify against him); State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 171 S.W.2d 822, 826 (1942), (student not allowed to cross-examine those testifying against him) *cert. denied*, 319 U.S. 748 (1943). *See generally* Seavey, *Dismissal of Students: "Due Process"*, 70 HARV. L. REV. 1406 (1957) (students not afforded normal procedural safeguards).

[25] 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961). One commentator noted that in *Dixon* "[t]he Constitution was first brought to the campus. . . ." Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1059 (1969).

[26] *Dixon*, 294 F.2d at 151-52. The Alabama State Board of Education expelled the plaintiffs from the Alabama State College for Negroes for their alleged participation in a "demonstration" at the Montgomery County Courthouse. *Id.* at 152. This "demonstration" consisted of a sit-in which occurred when the plaintiffs were refused service in the courthouse's segregated lunch grill. Wright, *supra* note 25, at 1030.

[27] *Dixon*, 294 F.2d at 154. The Board voted "on or about March 2, 1960" to expel the plaintiffs. *Id.* at 153-54. The plaintiffs were not officially notified of the expulsions until either March 4th or 5th. *Id.* at 154.

[28] *Id.* at 157. The court found that the due process clause protected the plaintiffs' "right to remain at a public institution of higher learning in which [they] were students in good standing." *Id.* at 156-57.

The Fifth Circuit applied the *Dixon* holding to the suspension of high school students in *Williams v. Dade County School Board.*[34] In *Williams*, the high school principal suspended the plaintiff for forty days following an informal meeting at which the principal explained to the plaintiff's parents the nature of the acts allegedly committed.[35] The court not only found that the meeting was not a "hearing" within the meaning of *Dixon*,[36] but also that the purpose of the meeting was to explain to the parents that the principal had already reached a decision.[37] The court felt that a suspension of forty days was equal to the loss of a full school term,[38] a penalty of such magnitude that it should not be imposed without an attempt to properly ascertain the pertinent facts.[39] Applying the standards enunciated in *Dixon*, the court ruled that before suspending a student, disciplinarians should properly notify the student of the charges, provide him with the names of witnesses and a summary of their testimony, and give him an opportunity to refute the charges.[40]

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[29] *Id.* at 158. The allegations should contain the grounds which would justify expulsion if proven. *Id.*

[30] *Id.* The court noted that due process did not require a "full-dress judicial hearing," including the right to cross-examine witnesses, which would be detrimental to the school's educational atmosphere. *Id.* at 159.

[31] *Id.* at 158. While the necessary degree of formality has varied, courts have not held school systems to the strict standards of criminal procedure. Comment, *Due Process Rights in Student Disciplinary Matters*, 14 J. C. & U. L. 359, 370-71 (1987). *See* Jenkins v. Louisiana State Bd. of Educ., 506 F.2d 992, 1000 (5th Cir. 1975) (requirements of due process in school suspension not equivalent to that essential to criminal trial); Norton v. Discipline Comm., 419 F.2d 195, 200 (6th Cir. 1969) (student discipline not analogous to criminal procedure); Esteban v. Central Mo. State College, 415 F.2d 1077, 1090 (8th Cir. 1969) (school regulations not measured by criminal procedure standards).

[32] *Dixon*, 294 F.2d at 159.

[33] *Id.* The court stated that the student's defense should include "either oral testimony or written affidavits of witnesses on his behalf." *Id.*

[34] 441 F.2d 299 (5th Cir. 1971). The Fifth Circuit encountered an argument of procedural due process in a high school setting years earlier in Woods v. Wright, 334 F.2d 369 (5th Cir. 1964), an appeal from a district court's refusal to enjoin a school superintendent from enforcing a board of education's order expelling or suspending students in Birmingham, Alabama. *Id.* at 371-73. The appellants maintained that the suspensions and expulsions without prior notice or hearing violated their due process rights. *Id.* at 374. Although the court of appeals granted the temporary restraining order, it held that the due process question was not properly before it for decision. *Id.*

[35] *Williams*, 441 F.2d at 300. The school principal originally suspended Williams, a senior at Miami Killian Senior High School, for ten days following his alleged participation in a "mob attack." *Id.* Subsequently, the principal imposed an additional 30-day suspension pursuant to Regulation 5114 of the Dade County, Florida, Board of Education. *Id.* at 299. This regulation provided for the additional period if deemed necessary by the school's principal and the Superintendent of Schools. *Id.* n. 1.

[36] *Id.* at 300-01. The Board argued that if the hearing provided was inadequate, it

In 1972 in *Pervis v. LaMarque Independent School District*,[41] the Fifth Circuit extended the requirements of procedural due process considered in *Williams* to high school suspensions of even longer duration. In *Pervis*, a high school principal suspended two students on February 9 and 16, respectively, for the remainder of the school term[42] allowing neither a hearing prior to suspension.[43] After both students filed suit against the school district in federal district court, the school's Board of Trustees, at the suggestion of the court,[44] held a hearing on May 4,

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was a result of the plaintiff's failure to contest the charges at the informal meeting with the school's principal. *Id.* at 300. The court disagreed with this contention, finding that the meeting was not called to weigh the facts objectively and arrive at a fair decision. *Id.*

[37] *Id.* Regulation 5114 did not require notification of the student's parents until after approval of the suspension. *Id.* n. 1.

[38] *Id.* at 301. The court distinguished *Williams* from *Banks v. Board of Public Instruction*. *Id.* In *Banks*, the district court upheld the constitutionality of a section of Regulation 5114, allowing a ten-day suspension without a hearing. Banks v. Board of Pub. Instruction, 314 F. Supp. 285, 293-94 (S.D. Fla. 1970), *vacated and remanded*, 401 U.S. 988 (1971). In *Williams*, the court found the principal and superintendent had levied the additional 30-day suspension "after tensions [had] beg[u]n to subside" and the need for expeditious action was not compelling. *Williams*, 441 F.2d at 301.

[39] *Williams*, 441 F.2d at 301. The court noted that it was not necessary to provide a student with the types of procedural protection provided a defendant in a criminal prosecution. *Id.*

[40] *Id.* at 302 (citing *Dixon*, 294 F.2d at 150).

[41] 466 F.2d 1034 (5th Cir. 1972).

[42] *Id.* at 1056. Conduct necessitating suspension included infractions of school rules relating to "tardiness, missing of classes, disruption of classes, disobedience, etc." *Id.* Both students, Pervis and McGrue, were eleventh grade students. *Id.*

[43] *Id.* Following the suspensions, Pervis's mother received a letter from the school's principal informing her of the suspension and detailing the infractions committed by her son. *Id.* The letter contained no mention of any right to a hearing or appeal. *Id.* McGrue's mother received a similar letter, which, while containing no explanation of the charges against the student, did advise the mother to contact the principal if she wished to appeal or present further evidence on her daughter's behalf. *Id.*

[44] *Id.* While the district court "suggested" that a hearing be conducted at which the students could appear and defend themselves, it refused to grant an order temporarily

at which the Board affirmed the suspensions.[45] The students argued that the failure to provide hearings prior to suspension violated their right to procedural due process.[46] The court of appeals ruled that the students received neither notice nor a fair hearing as required by *Dixon*.[47] Since the current suspensions were more serious than those involved in the *Williams* case, the court required "*Dixon*-like procedures."[48] Disagreeing with the district court's finding that the subsequent hearing cured the absence of an initial hearing,[49] the court concluded that the idea "that punishment cannot be imposed before a hearing is given" was basic to the idea of due process[50] and that vindication at a subsequent hearing still denied the students three weeks of education.[51]

Prior to 1972, the United States Supreme Court decided procedural due process issues through the application of an imprecise balancing of the individual's interest against the interest of the state in summary adjudications.[52] To remedy this situation, the Court in *Board*

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restraining the school district from continuing to exclude the students from school. *Id.*

[45] *Id.*

[46] *Id.* The students also argued that since suspension was pursuant to § 21.301 of the Texas Education Code, a three-judge district court should hear the case in accordance with §§ 2281 and 2284 of Title 28 of the United States Code. *Id.* The school district maintained that the suspension was pursuant to a school disciplinary regulation, thus, not requiring a three-judge court. *Id.* The court of appeals found that regardless of the authority requiring discipline, there need be no three-judge court as there was "no substantial question" concerning the constitutionality of § 21.301. *Id.* The court also rejected the students' argument that the statute was unconstitutionally vague, finding that any uncertainty in the statute could be clarified by reading it in context with other statutory provisions. *Id.* at 1057. As to the students' contention that the statute was unconstitutional for failing to require a hearing, the court found that the inclusion of the words "found guilty" in the statute implied that the statute's framers contemplated "some type of hearing." *Id.*

[47] *Id.* at 1058. The court noted that "[a]mong the basic guarantees [of procedural due process] are the right to be heard in one's own defense and the right to be given notice of the charges." *Id.*

[48] *Id.* The school board had suspended Pervis and McGrue for almost three months without the proper procedural protection in a situation similar to that in *Williams*, according to the court. *Id.*

[49] *Id.* At the hearing on May 4, the court ruled that the Board "did not attempt to impose any new punishment," but only affirmed the principal's earlier actions. *Id.*

[50] *Id.* Although there were occasions not requiring compliance with the requirements of *Dixon*, the court concluded these occasions would include those involving minimal punishment or violence. *Id.*

[51] *Id.*

[52] *See* Note, *Procedural Due Process and Short Suspensions From the Public Schools: Prologue to* Goss v. Lopez, 50 NOTRE DAME LAW. 364, 369 (1974) (Supreme Court's pre-*Roth* due process analysis viewed as imprecise). *See also* Boddie v. Connecti-

of Regents of State Colleges v. Roth[53] set forth definitive guidelines for making the determination of interests which the due process clause protected.[54] In *Roth*, the Wisconsin State University-Oshkosh, without explanation, refused a professor continued employment upon the expiration of his one-year contract.[55] Applicable state law left the retention of such employees to the complete discretion of university officials.[56] The Court delineated a two-phase analysis applicable in making procedural due process determinations.[57] First, a court should determine whether the fourteenth amendment's protection of liberty[58] or property encompassed the individual's interest,[59] looking to the "nature,"[60] rather than the "weight" of the interest involved.[61] Finding a protected

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cut, 401 U.S. 371, 378 (1971) (procedural requirements can vary depending on interests involved); Goldberg v. Kelly, 397 U.S. 254, 263 (1970) (extent to which due process must be provided depends on whether welfare recipient's interest in avoiding loss was greater than governmental interest in summary adjudication); Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961) (considerations of what procedures due process required begins with determination of nature of government function involved and private interest affected); Hannah v. Larche, 363 U.S. 440, 442 (1960) (exact boundaries of due process are undefinable); Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 163-64 (1951) (due process cannot be limited to formula).

[53] 408 U.S. 564 (1972).

[54] *Id.* at 571.

[55] *Id.* at 566. Roth was an assistant professor of political science at Wisconsin State University-Oshkosh. *Id.*

[56] *Id.* at 567. The applicable Wisconsin statute provided: "All teachers in any state university shall initially be employed on probation. The employment shall be permanent, during efficiency and good behavior after four years of continuous service in the state university system as a teacher." WIS. STAT. § 37.31 (1) (1967). However, there were no statutory or administrative guidelines defining eligibility for re-employment beyond the fixed term of one academic year. *Roth*, 408 U.S. at 566-67.

[57] *Roth*, 408 U.S. at 570-71.

[58] *Id.* at 571. The Court noted that, "[i]n a Constitution for free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." *Id.* at 572. *See* Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954) (liberty not restricted except for proper governmental objective).

[59] *Roth*, 408 U.S. at 571. The Court stated that in order for an individual to have a property interest in a benefit, the individual must have "a legitimate claim of entitlement to it." *Id.* at 577. Independent sources, such as state law, would create the existing rules and understandings that supported claims of "entitlement" to benefits. *Id.*; *see, e.g.*, *Goldberg*, 397 U.S. at 262 (welfare benefits constituted statutory entitlement).

[60] *Roth*, 408 U.S. at 571. *See* Morrisey v. Brewer, 481 U.S. 471, 481 (1972) (whether procedural protections are due dependent upon whether fourteenth amendment encompassed nature of interest).

[61] *Roth*, 408 U.S. at 571. The Court noted that a "weighing process" has long been a part of the determination of the type of hearing required by due process in particular situations. *Id.* at 570. *See supra* note 52 and accompanying text.

interest, the court should then ascertain the procedures necessary to satisfy due process requirements.[62] In *Roth*, the majority reasoned that since the teacher had no claim of "entitlement" to the position under local law,[63] then there was no deprivation of property requiring a termination hearing.[64]

Applying the *Roth* analysis, the United States Supreme Court considered its first student suspension case in *Goss v. Lopez*.[65] In *Goss*, disciplinarians suspended students without hearings for periods of up to ten days.[66] Neither the applicable state statute[67] nor the school district's guidelines[68] required the disciplinarian to provide reasons prior to suspension nor to afford the suspended student the opportunity to contest the decision.[69] The Court found that school suspensions denied a student's property "entitlement" interest in educational benefits,[70] as well as the student's liberty interest in reputation.[71] Concluding that a ten-day suspension from school was not "de minimis" and, therefore, could not be imposed without procedural protection,[72] the Court held that for suspensions of ten days or less, a school must provide the student with oral or written notice of the charges against him.[73] Furthermore, if the student denied the charges, the school must give him an opportunity to explain his version of the incident.[74] The Court, however, stopped short of requiring that hearings in connection with short suspensions allow the student the right to obtain counsel, to confront and cross-examine witnesses, or to call his own witnesses,[75] stressing that its holding addressed only suspensions not exceeding ten days.[76] Longer suspensions or expulsions, the Court conceded, might require the affordance of more formal procedures to the student.[77]

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[62] *Roth*, 408 U.S. at 570-71. In Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) the Court promulgated a three-part analysis to ascertain what process was due in a given situation. Under this analysis, the factors to consider were: (1) the private interest affected by the government action; (2) the risk of an erroneous deprivation of that interest; and (3) the government's interest, including the fiscal and administrative burdens additional procedural requirements would involve. *Id.* at 335. *See* Nash v. Auburn Univ., 812 F.2d 655, 660 (11th Cir. 1987) (court applied *Eldridge* analysis in student disciplinary case); Gabrilowitz v. Newman, 582 F.2d 100, 105 (1st Cir. 1978) (same); Gorman v. University of R.I., 646 F. Supp. 799, 808 (D.R.I. 1986) (same); Picozzi v. Sandalow, 623 F. Supp. 1571, 1577-79 (E.D. Mich. 1986) (same); Jaksa v. Regents of Univ. of Mich., 597 F. Supp. 1245, 1248 (E.D. Mich. 1984) (same), *aff'd per curiam*, 787 F.2d 590 (6th Cir. 1986); Hart v. Ferris State College, 557 F. Supp. 1379, 1387 (W.D. Mich. 1983) (same); Bleicker v. Board of Trustees, 485 F. Supp. 1381, 1387-88 (S.D. Ohio 1980) (same); Ross v. Pennsylvania State Univ., 445 F. Supp. 147, 153 (M.D. Pa. 1978) (same). *See generally* Golden, *College Student Dismissals and the* Eldridge *Factors: What Process Is Due?*, 8 J. C. & U. L. 497 (1981) (examined manner in which courts have applied second step of *Eldridge* analysis in student disciplinary cases).

[63] *Roth*, 408 U.S. at 578. The Court arrived at this conclusion despite Roth's suggestion that most teachers hired by the college on a yearly basis were rehired. *Id.* at 578 n. 16. *But see* Perry v. Sindermann, 408 U.S. 593, 601-02 (1972) (university should give dismissed teacher opportunity to prove entitlement in light of institution's practices).

[64] *Roth*, 408 U.S. at 578. Although Roth did have an "abstract concern in being rehired," the Court concluded this "concern" was not sufficient to constitute a property interest necessitating a hearing. *Id.*

[65] 419 U.S. 565 (1975). *See* Note, *Constitutional Law*: Goss v. Lopez: *Much Ado About Nothing or the Tempest*, 7 Loy. U. Chi. L.J. 193, 195-96 (1976) (*Goss* was addition to limited number of cases in which Court abandoned traditional attitude of non-interference in school concern).

[66] *Goss*, 419 U.S. at 568. All of the students attended schools within the Columbus, Ohio, Public School System. *Id.* at 567. Eight of the students' suspensions were for participation in various forms of "disruptive behavior" on school premises. *Id.* at 569-70. The school files were silent as to the reasons for suspension of the ninth student. *Id.* at 571.

[67] *Id.* at 567. The Ohio Code provided the principal of an Ohio school with the authority to suspend a student for misconduct for up to ten days or to expel him. Ohio Rev. Code Ann. § 3313.66 (Anderson 1972). In either situation, the statute provided that the principal had the obligation to notify the student's parents within twenty-four hours, explaining the grounds for his action. *Id.*

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[68] *Goss*, 419 U.S. at 567. Under § 1010.14 of the Administrative Guide of the Columbus Public Schools, schools could suspend or expel students under § 3313.66 of the Ohio Code. *Id.* This was the only administrative regulation on the subject of suspensions and expulsions. *Id.* at 567 n. 1.

[69] *Id.* at 569-70. Subsequent to the suspensions, school authorities gave each student, along with his or her parents, the opportunity to attend a conference "to discuss the student's future." *Id.* at 570.

[70] *Id.* at 574. State law provided for a free education to all residents between five and twenty-one years of age. OHIO REV. CODE ANN. § 3313.48 to -.64 (Anderson 1972 and Supp. 1988). The Ohio Code also contained a compulsory school attendance law. *Id.* § 3321.04. The Court reasoned that "[h]aving chosen to extend the right to an education to people of [the suspended students'] class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred." *Goss*, 419 U.S. at 574. Courts generally view public school attendance as "a protectable interest, a form of the 'new property.' " *See* Comment, *supra* note 54, at 1054 (state compulsory education laws indicated evidence of claim of protected interest). *See also Perry*, 408 U.S. at 601-02 ("entitlement" may be implied in light of institution's practices); Mass, *Due Process Rights of Students: Limitations on* Goss v. Lopez — *A Retreat out of the "Thicket"*, 9 J. L. & ED. 449, 459 (1980) (in state without compulsory free education, no "property" right in education could exist); Comment, *Due Process in School Discipline: The Effect of* Goss v. Lopez, 12 SAN DIEGO L. REV. 912, 922-23 (1975) (same). *But see* Comment, *supra* note 54, at 1054-55 (though compulsory education laws seemed to be strongest evidence of "claim of entitlement," actual codification was not necessary).

[71] *Goss*, 419 U.S. at 574-75. The Court held that if charges against a student became part of the student's record, they could damage seriously the student's reputation and standing at school as well as interfere with his educational and employment opportunities. *Id.* at 575.

[72] *Id.* at 576. Agreeing with the district court's holding that there were exceptional situations in which the requirements of notice and hearing could not be met, the Court concluded, however, that these situations involved students whose presence on school grounds "pose[d] a continued danger to persons or property or an ongoing threat of disrupting the academic process. . . ." *Id.* at 582. In such a situation, authorities could immediately remove the student from school, with the necessary notice and hearing following "as soon as practicable." *Id.* at 582-83.

[73] *Id.* at 581. The Court did consider that the total freedom of school authorities from notice and hearing requirements was necessary to enable schools to operate with "acceptable efficiency." *Id.*

Federal courts in Mississippi, as well as the Mississippi Supreme Court, have followed the *Goss v. Lopez* rationale in addressing the requirements of procedural due process for suspended or expelled high school students. In *Keough v. Tate County Board of Education*,[78] the Fifth Circuit Court of Appeals affirmed the district court in considering a procedural due process violation connected with a high school student's expulsion from school.[79] The alleged violation occurred following a meeting with the school principal during which he suspended the student Keough for ten days.[80] Subsequently, the Board of Education decided at a hearing to suspend Keough for the remainder of the school year, but allowed him to take first semester exams.[81] Keough argued that in two separate instances both the principal and the Board had violated his procedural due process rights[82] and that the district court had erred in considering his guilt or innocence in its review.[83] Following *Goss v. Lopez* the court found that the principal had given Keough "*some* kind of notice" and "*some* kind of hearing,"[84] concluding that the "informal give-and-take" between Keough and the principal met procedural due process requirements for short-term suspensions.[85] Furthermore, the Fifth Circuit found that not providing the list of witnesses until the day of the hearing would not be prejudicial where "the witnesses provided no surprises" against which the party lacked defenses.[86] To establish a denial of due process, the court ruled, an aggrieved party had to demonstrate "substantial prejudice."[87]

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[74] *Id.* The Court noted that the hearing could take place immediately after notice. *Id.* at 582. In the majority of situations , the school official could "informally discuss the alleged misconduct with the student minutes after it has occurred." *Id.*

[75] *Id.* at 583. Trial-type procedures, the Court felt, would make the disciplinary process too costly, as well as destroy its utility as part of the educational process. *Id.* Simply allowing the student an opportunity to give his version of the events would apprise the disciplinarian of factual disputes and disagreements concerning "cause and effect." *Id.* at 583-84. At that point, the disciplinarian could allow more formal procedures if necessary. *Id.* at 584. Commentators have noted that those flexible *Goss* standards might be "unlikely to deter the school administrator unconcerned with the excuses or the constitutional rights of his charges." Note, *Due Process, Due Politics, and Due Respect: Three Models of Legitimate School Governance*, 94 HARV. L. REV. 1106, 1108-09 (1981). Instead, the informal meetings required by *Goss* were "valued largely for their symbolism." *Id.* at 1112. The divided case law on the role of counsel in disciplinary proceedings illustrates the need for the Court to issue more definitive guidelines on the subject. *See, e.g.*, Greenhill v. Bailey, 519 F.2d 5, 9 (8th Cir. 1975) (attorney's presence "would serve no useful purpose"); Gorman v. University of R.I., 646 F. Supp. 799, 806 (D.R.I. 1986) (due process did not require representation by counsel at suspension hearing); Jaksa v. Regents of Univ. of Mich., 597 F. Supp. 1245, 1252 (E.D. Mich. 1984) (same), *aff'd per curiam*, 787 F.2d 560 (6th Cir. 1986). *But see*, Dillon v. Pulaski County Special School Dist., 468 F. Supp. 54, 58 (E.D. Ark. 1978) (expelled student denied due process by school board's refusal to allow student's counsel to cross-examine accuser), *aff'd*, 594 F.2d 699 (8th Cir. 1979).

[76] *Goss*, 419 U.S. at 584.

[77] *Id.*; *see, e.g.*, Black Coalition v. Portland School Dist. No. 1, 484 F.2d 1040, 1045 (9th Cir. 1973) (students subject to expulsion must have hearing at which student has counsel and right to cross-examine witnesses). *See generally* Steinberg, *Student Suspension and Expulsion Proceedings in Tax Supported Institutions: What Process is Due?*, 7 ST. MARY'S L.J. 319, 329-31 (1975) (students subject to long suspension or expulsion should have legal representation and confrontation rights).

[78] 748 F.2d 1077 (5th Cir. 1984).

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[79] *Id.* at 1081.

[80] *Id.* at 1079. The principal suspended plaintiff, a senior at Independence High School in Tate County, Mississippi, for "repeated misbehavior in school." *Id.* at 1078. This misbehavior included the use of profanity, leaving school grounds without permission, and challenging the school's principal to a fight. *Id.*

[81] *Id.* at 1079. At the hearing on December 14, 1983, three of the plaintiff's teachers, the school's principal, and the school's vice-principal testified and submitted to cross-examination by the plaintiff. *Id.*

[82] *Id.* at 1079-80. Keough contended that his December 9 meeting with the principal violated procedural due process requirements for short-term suspensions since the meeting's purpose was to punish rather than to discover facts. *Id.* at 1080. He also maintained that more formal procedures were necessary in view of the long-term effect of a ten-day suspension during exams. *Id.* As to the December 14 meeting before the Board, Keough argued that he was not fully apprised of the nature of the meeting and that prior to the hearing date, the Board should have provided him with a list of testifying witnesses along with a summary of their testimony. *Id.*

[83] *Id.* at 1083. The district court should have considered only whether he had received sufficient procedural due process, Keough argued. *Id.* Keough raised this argument regarding the district court's alternative ground for its decision that notwithstanding a procedural due process violation Keough would lose, since based on his admission of the truth of the allegations, he suffered no attributable harm. *Id.*

[84] *Id.* at 1080 (citing *Goss*, 419 U.S. at 576) (emphasis in original). Keough's notice of his misconduct and his hearing or opportunity to state his case, both occurred during his confrontation with the principal Massey. *Id.* at 1079-80.

[85] *Id.* at 1080. The Fifth Circuit concluded that even though the suspension occurred during exams, more formal procedures were not necessary as *Goss* did not distinguish between ten day suspensions occurring during exam periods and those that did not. *Id.* The court also noted that the Board allowed Keough to take final exams. *Id.* at 1081.

[86] *Id.* at 1082. The court noted that normally a witness list should be provided to

The Mississippi Supreme Court considered an allegation of denial of due process to a high school student in *Warren County Board of Education v. Wilkinson.*[88] In *Wilkinson*, the alleged denial occurred when a school board refused the student credit for a semester,[89] following a hearing at which no witnesses offered testimony against the student.[90] The court recognized the school district's power to discipline students,[91] but found that the Board neither complied with constitutionally mandated due process requirements,[92] nor its own self-im-

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satisfy due process requirements in cases involving long-term suspensions. *Id.* at 1081. *See* Sweet v. Childs, 507 F.2d 675, 681 (5th Cir. 1975) (names of witnesses included in list of charges); Boykins v. Fairfield Bd. of Educ., 492 F.2d 697, 701 (5th Cir. 1974) (students should have lists of witnesses and summary of their testimony); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 159 (5th Cir.) (same), *cert. denied*, 368 U.S. 930 (1961). However, in *Dixon* the court added that the process due depended upon the particular circumstances of the case. *Dixon*, 294 F.2d at 158. In *Keough*, the superintendent set forth the charges against the plaintiff in a letter to the plaintiff's parents. *Keough*, 748 F.2d at 1081. The plaintiff also admitted that he was aware of at least two occasions in which he had violated school policy. *Id.* at 1082.

[87] *Keough*, 748 F.2d at 1083 (citing U.S. Pipe & Foundry v. Webb, 595 F.2d 264, 274 (5th Cir. 1979); Arthur Murray Studio, Inc. v. Federal Tax Comm'n, 438 F.2d 622, 624 (5th Cir. 1972)). The court found that Keough's admission of the truth of the charges was relevant to a finding of a lack of substantial prejudice. *Keough*, 748 F.2d at 1083.

[88] 500 So. 2d 455 (Miss. 1986).

[89] *Id.* at 461. The Board denied credit to the student Alexandra Renee Wilkinson, a sixteen year old sophomore, after finding her in violation of the school's alcohol and drug policy, a "Type IV offense" promulgated in the student handbook and involving the harshest punishments. *Id.* at 458, 461. The alleged violation occurred in the student's home when she and a friend consumed "two or three sips" of her father's beer prior to the last day of school. *Id.* at 456.

[90] *Id.* at 458. Although the student's father requested that the two accusing teachers appear at the hearing, these teachers were not made available. *Id.* Bypassing his right to appeal the decision of the Board, Mr. Wilkinson sought an injunction in the Chancery Court of Warren County. *Id.* at 457-59. The chancellor issued an injunction for denial of procedural due process and further awarded nominal damages and attorney's fees. *Id.* at 458. The Warren County School Board appealed. *Id.* at 455.

[91] *Id.* at 459-60. Citing Clinton Mun. Sep. School Dist. v. Byrd, 477 So. 2d 237, 240 (Miss. 1985), the court reemphasized the substantial authority of boards of education under MISS. CODE ANN. §§ 37-9-71 and 37-7-301 (1972) to suspend or expel students for violation of school policies in situations which advanced the school district's legitimate interest. *Wilkinson*, 500 So.2d at 459. *See, e.g.*, Shows v. Freeman, 230 So. 2d 63, 64 (Miss. 1969) (courts will not question school board's rule provided rule has some rational basis).

[92] *Wilkinson*, 500 So. 2d at 458. The court stated that the Board's failure to have the teachers available was a denial of the student's due process rights. *Id.* (citing Dillon v. Pulaski County Special School Dist., 594 F.2d at 699, 700 (8th Cir. 1979)).

posed procedural requirements.[93] In doing so, the Board punished the student for conduct that school regulations did not prohibit.[94]

In the instant case, the Mississippi Supreme Court reasoned that due to the fact that it was unclear whether the Board of Trustees had considered anything other than the listed charges[95] or, in any event, that the plaintiff lacked informal notice of the additional allegations,[96] then the plaintiffs had failed to demonstrate the substantial prejudice[97] required to sustain a violation of procedural due process.[98] The court further ruled that admission of hearsay from school employees did not deprive the plaintiff of confrontation rights, as courts treat hearsay testimony of school employees differently from hearsay statements of students.[99] Finding no substantial deviations[100] from the minimum procedural due process requirements,[101] the court determined the question to be whether or not there was sufficient evidence to support the charges against the plaintiff.[102] The testimony that the plaintiff had distributed drugs to a student at school,[103] the court ruled, constituted sufficient evidence to support the allegation that the plaintiff had violated the school's drug policy,[104] thus validating the expulsion.[105]

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[93] *Wilkinson*, 500 So. 2d at 460. The Board had adopted a procedure whereby it would inform a student accused of violating school policy of the charges against him and the possible penalties. *Id.* Under the procedure, the student had the right to a hearing, in addition to the right to cross-examine witnesses against him, call witnesses of his own, have counsel represent him, and request in writing the names of the witnesses against him. *Id.* at 460-61. The court found that the Board ignored these guidelines, causing the hearing to become "no more than an inquiry and discussion." *Id.* at 461.

[94] *Id.* at 460. The court found that the school's alcohol policy clearly did not forbid the student's consumption of beer in her home. *Id.*

[95] Jones v. Pascagoula Mun. Sep. School Dist., 524 So. 2d 968, 972 (Miss. 1988). Dan Lee, Presiding Justice, wrote the court's opinion. *Id.* at 969.

[96] *Id.*; *see supra* notes 6-7.

[97] *Id.*; *see supra* note 85 and accompanying text.

[98] *Jones*, 524 So. 2d at 972. The court noted that "expulsion or suspension from school involves deprivation of a property interest protected by the Due Process Clause. . . ." *Id.* at 971 (citing *Goss*, 419 U.S. at 573-74).

[99] *Jones*, 524 So. 2d at 973. While hearsay testimony is generally inadmissible in judicial proceedings, hearsay testimony by school officials is admissible in student disiplinary proceedings. 2 J. RAPP, EDUCATION LAW, § 9.05 [3][f] (1984). *See, e.g.*, Tasby v. Estes, 643 F.2d 1103, 1106 (5th Cir. 1981) (court could determine rights in student disciplinary hearing upon hearsay evidence of school administrators); Boykins v. Board of Educ., 492 F.2d 697, 700-01 (5th Cir. 1974) (due process did not preclude basing expulsion on principal's hearsay testimony), *cert. denied*, 420 U.S. 962 (1975); Racine Unified School Dist. v. Thompson, 107 Wis. 2d 657, 321 N.W.2d 334, 337 (Wis. Ct. App. 1982) (hearsay statements from teachers and staff members admissible). *But see* School Bd. v. Department of Health, Educ., and Welfare, 525 F.2d 900, 906 (5th Cir. 1976) (to determine whether hearsay could constitute substantial evidence, court looked to certain factors which assured reliability and probative value); Fielder v. Board of Educ., 346 F. Supp. 722, 730 (D. Neb. 1972) (hearsay not allowed where hearing held 30 days after expulsion); De Jesus v. Penberthy, 344 F.Supp. 70, 75 (D. Conn. 1972) (where there was factual dispute, due process required "that readily available testimony be presented to fact-finders in person"); Franklin v. District School Bd., 356 So. 2d 931, 932 (Fla. Dist. App. 1978) (hearsay testimony alone insufficient by statute).

[100] *Id.* The court observed that since a school board lacked the power to subpoena,

The Mississippi Supreme Court's decision in *Jones* represents a somewhat reluctant step by the court in the direction of judicial deference to the actions of school administrators in student suspension and expulsion cases.[106] By speaking in terms of "informal notice" of allega-

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the denial of a witness list would not always amount to a prejudicial denial of due process. *Id.*; *see supra* note 86 and accompanying text. The witnesses who had appeared before the Disciplinary Review Committee also attended the Board hearing and were cross-examined. *Jones*, 524 So. 2d at 972. Prior to the Board hearing, plaintiffs' counsel was aware that nine students had mentioned the plaintiff before the committee. *Id.* at 972. However, plaintiffs' counsel called only three students as witnesses at the Board hearing. *Id.*

[101] *Jones*, 524 So. 2d at 973. The court noted that, at the very least, due process required notice and an opportunity to be heard. *Id.* at 972; *see supra* notes 72-74 and accompanying text. The court observed that the Board granted no more than the "barest minimum" of the required due process. *Jones*, 524 So. 2d at 973. Stating that where charges of misconduct are denied by the student, and the sole proof is the testimony of other students, the court ruled that "school boards should be especially sensitive to rights of students to know the complete nature of the changes against [them]." *Id.*; *see supra* notes 29, 72 and accompanying text. Confrontation rights may not be necessary; however, the court should provide written statements of those students not appearing. *Jones*, 524 So. 2d at 973. In addition, the court concluded that where there were multiple allegations, the judge should make findings of fact. *Id.* Although the court noted that the trial court possibly should not have allowed the other students' disciplinary hearing transcripts to be included in the plaintiff's record, it did not resolve this issue. *Id.* Its only concern was "whether the administrative proceedings were conducted according to due process requirements and whether the board acted on sufficient evidence." *Id.* at 972-73.

[102] *Jones*, 524 So.2d at 971.

[103] *Id.*; *see supra* note 6. The court noted that because of the evidence linking the plaintiff to drug distribution at school, it did not reach the question of whether a school board might discipline a student for similar activities off campus. *Id.*; *see supra* note 94 and accompanying text. The evidence against the plaintiff was one of the factors the court used to distinguish this case from the result in *Wilkinson*. *Jones*, 524 So. 2d at 972; *see supra* notes 88-94 and accompanying text. In *Wilkinson*, the court did not base its decision solely on the board's failure to adequately notify the student of the charge against her, but instead "looked to the Board's failure to provide witnesses against the student and to the substantive failure of the proof to show a violation of school rules." *Jones*, 524 So. 2d at 972.

[104] *Jones*, 524 So.2d at 971.

[105] *Id.* at 973.

[106] *See supra* note 91 and accompanying text.

tions[107] and a student's failure to demonstrate "substantial prejudice,"[108] the court seemed to accept the laxity of a school board in providing procedural safeguards.[109] This acceptance was only emphasized by the court's failure to hold the school board in *Jones* to the standards the court set forth at the close of the opinion.[110] The court then attempted to justify its decision by finding there was "sufficient evidence" to support the allegations against the plaintiff.[111] The question now becomes, "[w]hat procedures may a school board fail to afford and still grant the 'barest minimum' of due process?"[112] The United States Supreme Court, by limiting its holding in *Goss* to short suspensions,[113] left jurisdictions free to formulate their own guidelines as to what procedures would satisfy due process requirements when longer suspensions or expulsions were involved.[114] The resulting lack of uniformity,[115] coupled with results such as those reached in *Jones*, demonstrates the need for the Court to intervene in the proper situation and delineate procedural guidelines applicable when the sanctions against students become so severe.

David Burns

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[107] *See supra* text accompanying note 96.

[108] *See supra* note 82 and accompanying text and text accompanying note 97.

[109] *See supra* note 101 and accompanying text.

[110] *See supra* note 101.

[111] *See supra* notes 101-103 and accompanying text.

[112] *See supra* note 101.

[113] *See supra* notes 75-77 and accompanying text.

[114] *See id.*

[115] *See supra* notes 75, 77, 86, and accompanying text.

SCHOOLS — EDUCATION FOR ALL HANDICAPPED CHILDREN ACT OF 1975 — SCHOOL OFFICIALS MAY NOT UNILATERALLY CHANGE THE CURRENT EDUCATIONAL PLACEMENT OF A STUDENT PROTECTED UNDER THE ACT

Respondents[1] brought suit in the United States District Court for the Northern District of California[2] asserting violation of their statutory rights[3] and requesting injunctive relief against petitioners'[4] efforts to expel respondents from school.[5] The district court granted partial summary judgment for the respondents on their statutory claims[6] and permanently enjoined petitioners from taking any expulsion action that would affect the students' current educational placement.[7] The

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[1] Respondent John Doe was an emotionally disturbed child deemed handicapped within the meaning of the Education for All Handicapped Children Act of 1975. Honig v. Doe, 108 S. Ct. 592 (1988). Doe brought suit against local school officials and the California Superintendent of Public Instruction on a variety of allegations, ranging from failure to establish a policy regarding the discipline of disabled students to the failure of the former Superintendent of Public Instruction to intervene when the San Francisco United School District denied Doe his rights under the Education for All Handicapped Children Act [Act]. *Id.* at 599. Respondent Jack Smith, who had a propensity for aggressive behavior, was also handicapped within the meaning of the Act. *Id.* Since the claims raised by Doe and Smith were similar, Smith petitioned the district court to intervene, and the court granted the request. *Id.* at 600.

[2] Doe *ex rel.* Gonzales v. Maher, 793 F.2d 1470, 1470 (9th Cir. 1986). Judge Marilyn H. Patel presided. *Id.*

[3] Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400-1461 (1982)). The statute explicitly acknowledges:

> The Congress finds that (1) there are more than eight million handicapped children in the United States today . . . (3) more than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity . . . (4) one million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers.

Id. §§ 1400(b)(1), (3), (4) (1982). *See also* S. REP. No. 168, 94th Cong., 1st Sess. 8 (1975) ("[O]f the more than 8 million children . . . with handicapping conditions . . . only 3.9 million such children are receiving an appropriate education. 1.75 million handicapped children are receiving no educational services at all, and 2.5 million handicapped children are receiving an inappropriate education."), *reprinted in* 1975 U.S. CODE CONG. & ADMIN. NEWS 1425, 1432.

When Doe assaulted a fellow student and admitted his act, the school principal suspended him for five days. *Honig*, 108 S. Ct. at 599. On the last day of the suspension, the Student Placement Committee (SPC) of the San Francisco United School District (SFUSD) notified Doe's mother that the committee not only recommended permanent expulsion of her child, but also recommended his continued suspension until expulsion proceedings were completed. *Id.* at 598-99. Doe's suit alleged that the indefinite suspension and proposed expulsion violated § 1415(e)(3),the "stay-put" provision of the Act. *Id.*

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at 599. Doe sought a temporary restraining order to cancel the (SPC) hearing and an order that required school officials to call an Individualized Education Program (IEP) meeting. *Id.* Statutory construction provided that IEP meetings were to be attended by a representative of the local school district, the child's teacher, the child's parents or guardian and, when appropriate, the disabled child. 34 C.F.R. 300.344 (1978). The IEP objectives included evaluating the disabled child's correct educational performance, projecting short and long term educational goals and deciding the method or teaching services required to attain those goals. *Id.* § 300.346. The purpose of the IEP meeting was to serve "as a communication vehicle between parents and school personnel," and to enable them "to jointly decide what the child's needs are, what services will be provided to meet those needs, and what the anticipated outcomes may be." 34 C.F.R. § 300 app. c.(I)(a) (1986).

[4] *Maher*, 793 F.2d at 1478. Doe brought suit against local and district officials of the San Francisco United School District and the State Superintendent of Public Instruction, Wilson Riles. *Id.* However, during the pendency of the suit, Bill Honig succeeded Riles in office as California Superintendent of Public Instruction. *Id.* The plaintiffs-respondents prayed for injunctive and declaratory relief against the defendants in district court. *Id.* Plaintiffs-respondents additionally asked for damages against all parties in both their official and individual capacities. *Id.*

[5] *Honig*, 108 S. Ct. at 598-99. Doe attended the Louise Dombard School, a developmental center for disabled children. *Id.* at 598. On November 6, 1980, Doe choked a student with enough force to leave abrasions on the student's neck. *Id.* Doe also kicked out a window while being escorted to the principal's office after the altercation. *Id.* The principal initially suspended Doe for five days, but then proposed an extended suspension until completion of expulsion proceedings against Doe were resolved. *Id.* at 598-99. Respondent Smith was a student in a half-day program at A.P. Giannini Middle School, a regular public school. *Id.* at 599. The principal warned plaintiff-respondent Smith's grandparents that the respondent participated in "disruptive behavior" including stealing, extortion and a propensity for making sexual comments to female students. *Id.* On November 4, 1980, when Smith continued his disruptive behavior, the principal suspended him for five days and recommended permanent expulsion from the San Francisco United School District system. *Id.* at 599-600.

[6] *Maher*, 793 F.2d at 1478. Section 1415(e)(3) of the Act set forth the "stay-put" provision. 20 U.S.C. § 1415(e)(3) (1982). The Act provided that a student's "current educational placement" should remain the same pending administrative proceedings under the Act. *Id.* The district court found that since there was no "dangerousness" exception to the "stay-put" provision, any indefinite suspension pending a completion of expulsion proceedings constituted a direct violation of the statute. *Maher*, 793 F.2d at 1478.

[7] *Mayer*, 793 F.2d at 1478. The district court, in a lengthy declaratory judgment and permanent injunction, directed the state to provide direct services to a student when any local educational agency was unwilling or unable to comply with the educational mandate of the Act. *Id.* The district court additionally enjoined the state to either legislate a policy or develop a set of regulations to discipline handicapped students and to establish a system of checks to ensure local adherence to federal regulations governing disabled

United States Court of Appeals for the Ninth Circuit affirmed the district court order with modification.[8] The United States Supreme Court, *held*, affirmed.[9] Where school administrators seek to exclude disabled students from the classroom based upon the implication that a "dangerousness" exception to the statutory enactment to assure all handicapped children an appropriate public education existed, and where

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students. *Id.*

[8] *Id.* at 1476. The court of appeals affirmed the district court's holding that use of an indefinite suspension of a disabled child pending expulsion proceedings constituted a prohibited "change in placement" under § 1415(e)(3). *Id.* at 1485-86. The court of appeals additionally affirmed the district court's finding that a state must provide direct services to a disabled student when local school officials failed to do so. *Id.* at 1491-92. However, the court of appeals modified the district court's ruling on fixed suspensions, holding that suspensions up to thirty school days were not in violation of the Act's provisions. *Id.* at 1484.

[9] *Honig*, 108 S. Ct. at 606-07. The United States Supreme Court addressed the mootness issue extensively. *Id.* at 601-04. Since respondent Doe was twenty-four years old by the time the case was heard, the Court held that, as to Doe, the case was moot, as he was no longer entitled to the protection and benefits afforded children between the ages of three and twenty under the Act. *Id.* at 601. However, as to respondent Smith, the Court found that his case was justiciable. *Id.* Smith was only twenty-one years old, and, therefore, entitled to benefits provided under the Act. *Id.* at 601-02. The Court noted that there was a reasonable likelihood that Smith would once again suffer denial of Act entitlements that gave rise to the suit. *Id.* at 603. Thus, the conduct complained of by Smith was "capable of repetition yet evading review," hence justiciable by the court. *Id.* at 601. The Court affirmed the appeals court's holding that the "stay-put" provision prohibited school officials from unilaterally excluding disabled students from the classroom for dangerous or disruptive conduct pending review of their case and agreed that there was no "dangerousness" exception to the Act. *Id.* at 605. The Act, as interpreted by the Court, required that the student remain in his current educational placement. *Id.* The Court, however, disagreed with the court of appeals regarding maximum time limits on temporary suspensions, holding that suspensions in excess of ten days constituted a prohibited "change in placement." *Id.* at 607. If under the appropriate circumstances school officials needed to enjoin a student from attending school, the Court reasoned that adequate relief could be found under § 1415(e)(2), providing for injunctive remedy through the courts. *Id.* at 606. However, in such a situation, the Court indicated that a strong presumption existed in favor of the student, and that the Court would have to balance the student's right to a "free appropriate public education" against the school's interest in maintaining a safe learning environment for all students. *Id.* The statute currently defines the term "free appropriate education" as:

> [S]pecial education and related services which (A) have been provided at public expense under public supervision and direction, without charge, (B) meet the standards of the State educational agency, (C) include appropriate preschool, elementary, or secondary school education in the state involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

20 U.S.C. § 1401(18) (1982).

completion of review proceedings affecting students' educational placement under the Act remained incomplete, a school may not unilaterally suspend those students beyond a ten day period without implicating the "change in placement" prohibition of 20 U.S.C. section 1415(e)(3). *Honig v. Doe*, 108 S. Ct. 592 (1988).

Prior to the enactment of the Education for All Handicapped Children Act (the Act),[10] insufficient funding[11] limited the right of handicapped children to free appropriate education.[12] Local school districts were unsuccessful, and at times uncooperative,[13] in implementing effective plans to educate the exceptional child.[14] In response to the predicament of the nation's handicapped,[15] Congress passed the Act to alleviate the financial problems associated with appropriate placement by the local school system.[16] The legislation provided that a party could bring a civil action if he was unhappy with the results of a school district's decision concerning his educational placement.[17] The Act further allowed the child in question to be admitted or permitted to retain his current placement pending the outcome of the litigation.[18]

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[10] *See supra* note 3.

[11] S. REP. No. 168, 94th Cong., 1st Sess. at 6.

[12] Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

[13] Mills v. Board of Educ., 348 F. Supp. 866, 873 (D.D.C. 1972). In *Mills*, the plaintiffs were school children excluded from school by the District of Columbia School Board after being "labelled as behavioral problems, mentally retarded, emotionally disturbed or hyperactive . . . ." *Id.* at 868. The school board initially admitted the denial of education to the plaintiffs and agreed to a stipulated consent, but failed to submit their plan to the court as ordered. *Id.* at 871-73. The court then held that the School Board was required "to provide a publicly supported education for these 'exceptional' children." *Id.* at 876. When the school board argued that this duty was too great a burden to bear because of insufficient funds, the court held that lack of money was not an excuse. *Id. See generally* Haggerty and Sacks, *Education of the Handicapped: Towards a Definition of an Appropriate Education*, 50 TEMP. L.Q. 961, 971-72 (1977)(elements of remedy fashioned in *Mills* included zero rejection, individualized assessment and placement, least restrictive alternative, notice and hearing, and personal rights). The *Mills* court also held that due process required a pretermination of classification hearing or a pre-exclusionary hearing for specialized classes. *Mills*, 348 F. Supp. at 875. *See generally* Kirp, Buss, and Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 CALIF. L. REV. 40, 89 (1974)(confusion over *Mills* decision caused many educators to fear loss of discipline and control in name of due process).

[14] S. REP. No. 168, 94th Cong., 1st Sess. at 7. The first such plan implemented was the result of a consent decree obtained by the Pennsylvania Association for Retarded Children (PARC). Pennsylvania Ass'n for Retarded Citizens v. Pennsylvania, 343 F. Supp. 279, 302-303 (E.D. Pa. 1972). Schools had excluded the plaintiffs, mentally retarded school children, from free public education, determining that they were "uneducable" and, therefore, under state law, not entitled to state supported education. *Id.* at 281-82. Although plaintiffs challenged the state law as unconstitutional, the court could not reach the issues raised because of the stipulation and consent agreement between the parties. *Id.* at 284-88. The court determined, however, that the plaintiffs had "established a colorable claim under the Due Process Clause." *Id.* at 295. *See generally* Weintraub and Abeson, *Appropriate Education For All Handicapped Children: A Growing Issue*, 23 SYRACUSE L. REV. 1037, 1057 (1972)(*Mills'* and *PARC's* movement to due process as determining factor for placement of exceptional children frowned upon by educators as destabilizer of system).

[15] S. REP. No. 168, 94th Cong., 1st Sess. at 5; *see* Note, *Enforcing the Right to an*

Courts examined the provisions of the Act for the first time in *Stuart v. Nappi*.[19] The plaintiff, an emotionally disturbed high school student, sought injunctive relief against her school after she was suspended for disruptive conduct.[20] The issue before the court was

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"Appropriate" Education: The Education For All Handicapped Children Act of 1975, 92 HARV. L. REV. 1103, 1121 (1979)(factor in Congress' decision to pass Act was desire to accelerate mainstreaming of exceptional children and to rectify practice of "dumping" such students into inappropriate classes).

[16] 20 U.S.C. § 1400(c) (1982). *See generally* Note, *The Education For All Handicapped Children Act: Opening the Schoolhouse Door*, 6 N.Y.U. REV. L. & SOC. CHANGE 43, 62-63 (1976-77)(praises Act for revolutionary advances in human rights and education for handicapped despite flaws of expense and increased burdens on educators).

[17] 20 U.S.C. § 1415(e)(2) (1982). The statute provides in full:

> Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

Id.

[18] *Id.* § 1415(e)(3). The statute provides in full:

> During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parent or guardian, be placed in the public school program until all such proceedings have been completed.

Id.

[19] 443 F. Supp. 1235 (D. Conn. 1978).

[20] *Id.* at 1237-39. School authorities previously had classified the plaintiff into a special education program. *Id.* at 1238. The plaintiff's teacher requested a meeting concerning reclassification after plaintiff's attendance had dropped. *Id.* However, this meeting never occurred. *Id.* at 1239. During this period of non-attendance the plaintiff participated in several school disruptions which brought about her ten-day suspension. *Id.* During a hearing following the disciplinary suspension, the superintendent called for her expulsion. *Id.*

whether the "stay-put" provision of the Act[21] prohibited the expulsion of the student while she was awaiting the outcome of her action.[22] The court relied on the regulations of the Department of Health, Education and Welfare, implemented to carry out the Act, and the comments thereto[23] in deciding that expulsion was inappropriate.[24] The court found that expulsion would be an unauthorized change in the child's educational placement and, therefore, repugnant to the Act.[25] However, reasoning that temporary suspension for up to a maximum of ten days was not a change in placement,[26] the court concluded that the action was the appropriate procedure when dealing with a student who endangered the safety of others at school.[27]

In 1979, the United States District Court for the Western District of New York applied the safeguards of the Act to a handicapped child in *Sherry v. New York State Education Department*.[28] In *Sherry*, the plaintiff, a legally handicapped child, sought injunctive relief regarding her suspension from the State School for the Blind.[29] The plaintiff engaged in self-abusive behavior that ultimately led to hospitalization for injuries.[30] When the child's mother requested that her daughter be returned to school, the board refused, alleging insufficient supervisory staff.[31] The school officials finally suspended the plaintiff on December 29, 1978.[32] The New York court first held that the Act insured the rights of handicapped children to a "free and appropriate public education."[33] While the plaintiff's educational placement remained unchanged[34] until the indefinite suspension on December 29, 1978,[35] the

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[21] 20 U.S.C. § 1415(e)(3) (1982).

[22] *Stuart*, 443 F. Supp. at 1241. The court reasoned that the plaintiff had the right to stay in her current placement pending the outcome of the action even though that right was in direct conflict with the school's disciplinary procedures. *Id.*

[23] 34 C.F.R. § 300.513 (1988). The comment states: "[W]hile the placement may not be changed, this does not preclude a school from using its normal procedures for dealing with children who are endangering themselves or others." *Id.*

[24] *Stuart*, 443 F. Supp. at 1242. The court pointed out that the regulations did not permit expulsion during the pendency of the plaintiff's civil action. *Id. See generally* Kenny, *Education of All the Handicapped*, 12 URB. LAW. 505, 507 (1980)(educators are hampered by lack of guidelines and must proceed on case-by-case method without use of expulsion).

[25] *Stuart*, 443 F. Supp. at 1243. The court reasoned that the law entitled handicapped children to an educational placement in the "least restrictive environment." *Id.* at 1242. This meant to the court that there would be a range of appropriate placements with at least one fashioned to meet the needs of the student. *Id.* However, expulsion was not an option in this continuum, stated the court, since it had the effect of both changing placement and restricting changes to alternative placements. *Id.* at 1242-43.

[26] *Id.* at 1242. The court noted that the Act had procedures to change placement which superseded the use of expulsion. *Id.* Suspension, however, did not alter the student's placement, or the ability to obtain a change in placement, according to the court. *Id.*

[27] *Id. But see* Bender and Lorant, *Public Law 94-142: Challenging Individualized Education Programs Through Due Process Considerations*, 7 W. ST. U. L. REV. 137, 151 (1980)(interpreted *Stuart* allowing expulsion if child was endangering others).

[28] 479 F. Supp. 1328 (W.D.N.Y. 1979).

[29] *Id.* at 1331. The plaintiff contended that the school failed to provide her with a proper due process hearing in addition to other procedural safeguards of the Act. *Id.* at 1337-38.

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[30] *Id.* at 1330. The plaintiff, legally blind and deaf, suffered from brain damage and an emotional disorder which made her self-abusive. *Id.* Although the court did not indicate what type of injuries the plaintiff suffered, it was obvious from the court's language and subsequent actions by the school that the injuries were self-inflicted. *Id.* at 1330-31.

[31] *Id.* The superintendent said that the plaintiff required constant supervision to prevent her from seriously injuring herself and that the school lacked sufficient student-to-staff ratio to supervise such a self-abusive student. *Id.* at 1330.

[32] *Id.* The plaintiff, Deloween Sherry, missed two months of school between the time of the incident and official suspension. *Id.*

[33] *Id.* at 1335. The court also stated that handicapped children deserved the special services required to meet their individual needs assured them under the Act. *Id.*

[34] *Id.* at 1337. Since the plaintiff's educational placement remained unchanged, the procedural requirements of the Act were not necessary. *Id.*

Following the decision in *Sherry*, plaintiffs, in a suit filed in Maryland, unsuccessfully relied on *Sherry* in an attempted circumvention of procedural requirements under the Act. H.R. v. Hornbeck, 524 F. Supp. 215, 221 (D. Md. 1981). In *H.R.*, parents of thirteen handicapped school children in various Maryland counties brought suit against their respective school superintendents, challenging the "exclusion of handicapped children from educational services under school disciplinary procedures used for normal school children." *Id.* at 216. The parents contended that justifiable educational placement changes arose only after a determination by special education experts. *Id.* The defendants moved for dismissal arguing that the plaintiffs had failed to exhaust all the administrative proceedings provided under the Act prior to the commencement of a suit in district court. *Id.* The plaintiffs, in response to the motion, relied on the absence of the procedural requirements prior to the commencement of suit, as in *Sherry*. *Id.* However, the court distinguished the cases noting that since the state in *Sherry* failed to provide for procedural hearings under the Act, pursuit of administrative proceedings was futile. *Id.* In *H.C.*, however, as the state of Maryland had complied with the procedures established under the Act, the court required the plaintiffs to exhaust all administrative remedies prior to judicial review, dismissing the lawsuit. *Id.* at 221.

See School Bd. of Prince William County v. Malone, 762 F.2d 1210, 1217 (4th Cir. 1984)(relying in part on decision in *Sherry* upholding right of state officials to review expulsion decisions of local school boards). In *Malone*, school officials expelled a fourteen-year-old mentally handicapped student after he participated as a go-between in drug transactions. *Id.* at 1212. Adhering to procedures under the Act, a local screening committee composed of special education professionals first reviewed the suspension of the student, and found that his drug activities were unrelated to his handicap. *Id.* Thereafter, the school board expelled the student from school. *Id.* Later, a local hearing officer concluded that learning disabilities caused the misbehavior, and a state review officer court held that the suspension constituted a significant change in her educational placement in violation of the procedural safeguards afforded handicapped children under the Act.[36]

The Fifth Circuit Court of Appeals found procedural violations of the Act in 1981 in *S-1 v. Turlington*,[37] a case involving expulsion[38] of the plaintiffs[39] for alleged misconduct.[40] The officials argued that S-1's misconduct was not a product of his handicap.[41] The *S-1* court initially held that an expulsion constituted a change in educational placement, and that the Act mandated certain procedural benefits for expelled handicapped students.[42] School officials could, however, expel a handi-

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affirmed the decision. *Id.* at 1213. When the school board filed a complaint in district court, requesting reinstatement of expulsion, the district court dismissed the suit. *Id.* On appeal to the Fourth Circuit, the school board argued that its decision to expel the student was not reviewable since the misconduct occurred when the child was in an appropriate placement. *Id.* at 1215. The appeals court found the reasoning of the board to be unsound, reiterating the holding in *Sherry* that an expulsion constituted a change in placement which prompted review under the Act. *Id.* at 1214. *See also* John A. v. Gill, 565 F. Supp. 372, 377 (N.D. Ill. 1983)(relying on *Sherry* to maintain jurisdiction over suit based on possibility that plaintiff child faced future delays in Act appeals process).

[35] *Sherry*, 479 F. Supp. at 1337. When the formal indefinite suspension began on December 29, school authorities had changed the current educational placement of the plaintiff within the meaning of the Act. *Id.*

[36] *Id.* at 1337-38. The court indicated that although the temporary suspension was not a violation of the "stay-put" provision of the Act, the indefinite suspension constituted a violation of that provision. *Id.* The court distinguished the two provisions by indicating that the latter constituted a "significant change in educational placement." *Id.*; *see* Doe v. Rockingham County School Bd., 658 F. Supp. 403, 409 (W.D. Va. 1987)(school officials who required student to remain on suspension during pendency of administrative proceedings violated "stay-put provision"); Board of Educ. v. Illinois State Bd. of Educ., 531 F. Supp. 148, 150 (C.D. Ill. 1982)(five-day disciplinary suspension of handicapped child "who knew better" was not change in placement).

[37] 635 F.2d 342 (5th Cir.), *cert. denied*, 454 U.S. 1030 (1981).

[38] *Id.* at 344. The plaintiffs included eight students who attended Clewiston High School of Henry County, Florida. *Id.* The plaintiffs were either educable mentally retarded (EMR), mildly mentally retarded, or EMR/dull normal. *Id.*

[39] *Id.* The plaintiffs, seeking preliminary and permanent injunctive relief, wanted the court to compel state and local officials to provide them with educational services required under the Act. *Id.*

[40] *Id.* The misconduct included masturbation, insubordination, vandalism, and various other offenses. *Id.* n.1. The expulsions lasted for approximately one year and a half. *Id.*

[41] *Id.* at 347. The trial court ruled that school board officials did not have the necessary knowledge to reach such a decision. *Id.*

[42] *Id.* at 348. *But see* Wellock, *Developments in Education Law: 1981*, 15 CLEARINGHOUSE REV. 813, 822 (1982) (indicating confusion concerning practical implications of ruling which expressly recognized expulsion as disciplinary tool, yet concomitantly finding expulsion to be "change in educational placement"); *see also*, Blue v. New Haven Bd. of

capped student when his misconduct was not a result of his handicap.[43] The court concluded that a "trained and knowledgeable group of persons" should determine whether the student's behavior was a result of his handicapped condition.[44]

The involuntary transfer of a handicapped student from one school to another was the subject for an Eleventh Circuit appeal in *Victoria L. v. District School Board*.[45] School officials transferred Victoria L., who had a special learning disability,[46] from a public high school to a school reserved for disruptive students[47] because of her dangerous behavior.[48] Victoria L., arguing that the transfer violated both her equal protection rights and those under the Act,[49] sought to remain in the high school pending completion of the lawsuit.[50] School officials countered with expert testimony showing Victoria L. benefitted from a mixture of special education and regular classes at the new

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Educ., No. N81-41 (D. Conn. 1981)(least restrictive environment rule violated when school officials placed student on homebound instruction pending expulsion hearing). Thus, according to commentators, school officials would face difficulty in deciding the appropriate educational services for an expelled student which would meet judicial approval. Wellock, *supra*, at 822.

[43] *S-1*, 635 F.2d at 348. Although reasoning that expulsion remained a proper disciplinary measure, the court also indicated that it opposed a complete cessation of educational services during the expulsion. *Id.*

[44] *Id.* at 350. At least one author has indicated that *S-1* was a step in the wrong direction. *See* Champion, *The Discipline of Special Education Students in Public Schools*, 12 CAP. U.L. REV. 211, 227 (1982)(stating that expulsion "circumvents the goal of the federal laws, which is to provide every handicapped child with a free appropriate education in the least restrictive environment"). Stating that there is really no true way to separate the conduct of a handicapped student from his handicap, the commentator argued for an amendment to the federal laws prohibiting expulsions of all handicapped students. *Id.* In support of this conclusion, he pointed out that expulsions were "catastrophic" to the education of handicapped students. *Id.*

[45] 741 F.2d 369 (11th Cir. 1984).

[46] *Id.* at 371. The court characterized her disability as mild. *Id.*

[47] *Id.* The public high school was Cape Coral High School in Lee County, Florida. *Id.* The school designated for "disruptive and disinterested students" was the Alternative Learning Center. *Id.*

[48] *Id.* Victoria L.'s conduct "had not only proven unacceptable, it had been dangerous." *Id.* She committed relatively minor infractions such as smoking, missing classes and insubordination. *Id.* Additionally, she carried a razor blade and martial arts weapons to school and threatened to injure or kill a fellow student. *Id.*

[49] *Id.* Victoria L. contended the Act guaranteed her a public education, arguing the transfer discriminated against her on the basis of her handicap in violation of the fourteenth amendment. *Id.* at 372. She further maintained the transfer conflicted with her procedural rights under the Act and the due process clause of the fourteenth amendment. *Id.* at 371.

[50] *Id.*

school.[51] In response to the constitutional claim, the court reiterated earlier judicial findings that the Act offered the only redress for equal protection violations of a right to a public, special education,[52] repeating a Supreme Court ruling that the Act forbade a court from substituting its judgment as to educational policies for that of a school.[53] Despite the Act's requirement that special education students be educated in regular classes as much as possible,[54] the court concluded there was no evidence to show Victoria L.'s new environment was unnecessarily restrictive in view of school officials' desires to maintain safe schools.[55] Furthermore, the court held that the Act did not entitle Victoria L. to remain in her old school until adjudication of her suit.[56] School officials retained authority to transfer prior to adjudication because of their responsibility to provide safe schools, the court found.[57]

Another view of the "stay-put" provision emerged in October of 1984, when the District Court for the Southern District of Ohio considered the temporary removal of two disruptive students from classes in *Lamont X v. Quisenberry*.[58] Two severely behaviorally handicapped students, Del and Lamont,[59] sought injunctions to stop school authorities from preventing their return to school pending completion of proceedings for changing the placement of the handicapped students.[60] After violent outbursts by the two students in August 1984,[61] school officials removed Del from school until January of 1985 and Lamont until May of that year.[62] Although the school provided each student a home tutor for an hour daily,[63] the court recognized prior findings that expulsion represented a change in placement under the Act.[64] While the court warned that all modifications of instruction would not invoke Act proceedings,[65] it nevertheless found that removal from a classroom followed by home-based tutoring constituted a change in placement.[66] Finding that the Act created a "rebuttable presumption" that a child should remain in his current placement pending completion of the proceedings,[67] the court concluded that the school should not have removed Lamont and Del prior to completion of the proceedings without parental consent.[68] The preliminary injunction was, therefore, appropriate unless the defendant could demonstrate an equitable defense.[69] Although the school district argued that federal regulations associated with the Act permitted normal disciplinary actions against violent students during a complaint proceeding,[70] the court found that extended

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[51] *Id.* The school designated the part-time special education classes as a resource program. *Id.*

[52] *Id.* at 372 (quoting Smith v. Robinson, 468 U.S. 992, 1009 (1984)). The *Smith* Court concluded that Congress envisioned the Act as offering the only avenue for an equal protection claim to special education. *Id.* at 1009. Calling the Act an aid to states for complying with constitutional obligations, the court explained that Congress set up the administrative and judicial mechanisms of the Act for such claims. *Id.*; *see* Wexler v. Westfield Bd. of Educ., 784 F.2d 176, 180 (3d Cir.)(denying attorney fees on grounds that Act was exclusive method of suit and did not provide for attorney fees), *cert. denied*, 479 U.S. 825 (1986); Garrity v. Sununu, 752 F.2d 727, 735 (1st Cir. 1984)(same).

[53] *Victoria L.*, 741 F.2d at 373 (quoting Hendrick County Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982)). Although the Act provided that a reviewing court rule on a "preponderance of evidence basis," Congress did not intend for the judiciary to substitute its opinion on educational policy for that of the schools. *Rowley*, 458 U.S. at 206. The Act left responsibility for educational methods for the handicapped to state and local educational agencies working with parents. *Id.* at 207. *See* Tatro v. Texas, 703 F.2d 823, 830 (5th Cir. 1983)(holding that party attacking student placement in suit under Act has burden to show placement was wrong because of presumption in favor of school policy), *aff'd sub nom.* Irving Indep. School Dist. v. Tatro, 468 U.S. 883 (1984).

[54] *Victoria L.*, 371 F.2d at 374.

[55] *Id.* (citing S-1 v. Turlington, 635 F.2d 342, 348 (5th Cir.), *cert. denied*, 454 U.S. 1030 (1981)).

[56] *Victoria L.*, 371 F.2d at 374.

[57] *Id.* In finding for the school, the court said it was clear that Victoria constituted a threat to both students and school officials at Cape Coral High School. *Id.* Parents and school administrators not only failed to cooperate in this case, but actually assumed an "adversarial relationship" in the placement and education of the child. Hill, *Legal Conflicts in Special Education: How Competing Paradigms in the Education for All Handicapped Children Act Create Litigation*, 74 U. DET. L. REV. 129, 156 (1986). This situation typifies those cases that demonstrate the "inability of schools to adapt to the special needs of the handicapped student." *Id.*

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[58] 606 F. Supp. 809 (S.D. Ohio 1984).

[59] *Id.* at 811. Del, 15 years old at the time of the suit, and Lamont, 12 years old, fit the meaning of "handicapped" contained in the Act. *Id.* Section 1401(1) includes among the categories of handicapped those children who are "seriously, emotionally disturbed." 20 U.S.C. § 1401(l) (1982). The two lived at the Children's Home of Butler County. *Lamont X*, 606 F. Supp. at 811. The mother of Del, a former resident of a psychiatric hospital, had given up custody of him because of his destructiveness and uncontrollable behavior. *Id.* at 812. Lamont, whose natural mother abused him before releasing custody, had behavioral problems that encompassed "aggressive outbursts, behavior control problems, destructiveness toward property and physical abuse of others . . . and a tendency to be easily stimulated." *Id.*

[60] *Lamont X*, 606 F. Supp. at 811. The procedures required by the Act included a written notice to parents, a hearing, a right to appeal local agency educational decisions to state agencies and other procedural rights. 20 U.S.C. §§ 1415(b), (c) (1982). After exhausting the administrative procedures, a party could file a complaint in state or federal district court. *Id.* § 1415(e)(2). During the pendency of any proceedings, the child should remain in the same placement unless the child's parents or guardian consented to a change. *Id.* § 1415(e)(3).

[61] *Lamont X*, 606 F. Supp. at 812. On August 28, 1984, Del beat a fellow student, ripped the student's shirt, and threw books and a ruler around the classroom. *Id.* On August 30, 1984, Lamont exploded in anger, threatened an instructor and severely damaged a classroom. *Id.* Police removed Lamont from the classroom because school officials considered him a danger to other students and the teacher. *Id.*

[62] *Id.* at 812. The state of Ohio prosecuted, adjudging each a delinquent. *Id.* at 812-13.

[63] *Id.* at 812. School authorities expressed a willingness to provide as much home tutoring as the students could handle. *Id.* at 812 n.1. The school officials asserted Del refused to attend tutoring sessions with any regularity. *Id.*

[64] *Id.* at 813 (citing Doe v. Koger, 480 F. Supp. 225, 228-29 (N.D. Ind. 1979), *aff'd*, 710 F.2d 1209 (7th Cir. 1983) and Kaelin v. Grubbs, 682 F. 2d 595, 599-602 (6th Cir. 1982)). In *Koger*, school administrators expelled a handicapped student for disciplinary reasons. *Koger*, 480 F. Supp. at 226. The court said that the Act prohibited schools from expelling disruptive, handicapped students, but allowed their transfer to a more restrictive environment. *Id.* at 228. A student could be temporarily suspended only until schools found an appropriate, more restrictive setting. *Id.* at 229. The *Koger* Court indicated that handicapped children had no "superior rights." *Id.* Consequently, schools could expel the handicapped in the same manner as the non-handicapped upon a finding

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that unruly behavior stemmed from the child's willfulness, not his handicap. *Id. But see* Colley, *The Education for All Handicapped Children Act (EHA) A Statutory and Legal Analysis*, 10 J. L. & EDUC. 137, 160 (1981)(arguing that *Koger* approach to expulsion was difficult to manage because of almost insurmountable task of isolating cause of child's misbehavior).

In *Grubbs*, school officials expelled a 15-year-old handicapped student for insubordination, breaking a coffee cup and kicking his teacher. *Grubbs*, 682 F.2d at 597. The court held that an expulsion constituted a change in placement, thus entitling the student to procedural safeguards under the Act. *Id.* at 601-02. *Grubbs* dealt with the specific disciplinary measure in that case and did not establish "black letter" rules for schools. Note, *Kaelin v. Grubbs: The Expanding Outs of Public Schools to Educate the Handicapped*, 14 U. TOL. L. REV. 797, 820 (1983). After *Grubbs*, the commentator argued school officials should formulate "very strict guidelines for the discipline of handicapped students" to insure their adherence to the Act. *Id.*

[65] *Lamont X*, 606 F. Supp. at 813-14 (citing Tilton v. Jefferson County Bd. of Educ., 705 F.2d 800, 804 (6th Cir.), *cert. denied*, 465 U.S. 1006 (1983)). The *Tilton* court noted that defining a "change in placement" to include modification of educational programs would constrain school boards from making even minor changes in academic programs, inhibiting innovation. *Tilton*, 705 F.2d at 804 (quoting Concerned Parents and Citizens for the Continuing Educ. at Malcolm X (PS79) v. New York City Bd. of Educ., 629 F.2d 751, 755 (2d Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981)).

[66] *Lamont X*, 606 F. Supp. at 814. *Id.* Alternate placements included special classes and "home instruction." *Id.* (citing 34 C.F.R. § 300.551 (1988)).

The defendant unsuccessfully argued that a change in placement still did not demand that the child remain in his present placement pending completion of Act proceedings. *Id.* Although defendants maintained that Congress indicated only a preference for preserving the child's placement, the court found the cases inapplicable. *Id.* at 815.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.* The defendants relied on a comment in the regulations: "while the placement may not be changed, this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others." *Id.* (citing 34 C.F.R. § 300.513 comment (1988)). *See generally* Stuart v. Nappi, 443 F. Supp. 1235, 1242 n.5

home study represented extraordinary, not normal, discipline by the school,[71] and granted an injunction.[72]

Ruling contrary to *Lamont X*, the Fifth Circuit upheld a school's right to expel students for disciplinary reasons in the 1985 case of *Jackson v. Franklin County School Board.*[73] The *Jackson* case involved a seventeen-year-old learning-disabled student suspended from school for sexual misconduct with a female handicapped student.[74] After youth court action and a month-long stay in a mental hospital, the student sought readmission to school.[75] When school officials refused the request pending the development of an appropriate educational placement, the boy and his mother filed suit in district court, for a preliminary injunction against the continued suspension.[76] At the direction of the court, school officials developed an educational placement plan, rejected by the student and his mother since it denied in-school placement.[77] The Fifth Circuit affirmed the lower court's decision denying Jackson's motion for an injunction despite language in the Act prohibiting changes in educational placement of a handicapped child during the pendency of placement appeals.[78] Citing prior cases,

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(D. Conn. 1978)(explaining that comment inserted to allow school to maintain safety).

[71] *Lamont X*, 606 F. Supp. at 816. A school official testified that the institution's normal disciplinary measures included suspensions of up to ten days or expulsion. *Id.*

[72] *Id.* at 820.

[73] 765 F.2d 535 (5th Cir. 1985). James Jackson attended Franklin County Public Schools in the same facility with non-handicapped students. *Id.*

[74] *Id.* at 536. Jackson's suspension was for three days. *Id.*

[75] *Id.* The youth court committed Jackson to East Mississippi State Hospital where he remained for three months. *Id.*

[76] *Id.* at 537. Jackson orginally filed suit under 42 U.S.C. § 1983 seeking injunctive relief as well as $30,000 in damages. *Id.* Later Jackson filed an amended complaint based on the provisions of the Act. *Id.*

[77] *Id.* The mother later filed a suit seeking a second preliminary injunction to prevent the school board from continuing to refuse to readmit her son. *Id.* The district court denied the request. *Id.*

[78] *Id.* at 537-39. The district court determined that the school board had based its refusal to allow Jackson to remain in his placement on a reasonable conclusion that he "would disrupt the educational process and pose a threat to himself and others." *Id.* at 537.

A year and a half later, however, the Fifth Circuit, in considering a second suit filed by the mother, ruled that school officials on two occasions violated due process procedures under the Act. Jackson v. Franklin County School Bd., 806 F.2d 623, 639 (5th Cir. 1986). The court ruled that school officials failed to provide the mother with prior written notice of proposed changes in the educational placement of her son and also failed to inform her of her right to a hearing regarding the continued exclusion of her son from school. *Id.* at 639. By failing to provide these procedures, the court ruled that the school board deprived the teenager of his right to an education for two months. *Id.* at 631. The including *S-1*, the Fifth Circuit based its decision on the traditional authority of school boards to maintain safe schools.[79]

The Mississippi Supreme Court offered guidance to school authorities and courts facing situations governed by the Act in *Pascagoula Municipal Separate School District v. Doe*.[80] In *Pascagoula* school personnel suspended a learning disabled tenth-grade student for five days after confiscating six marijuana cigarettes and two knives from him at school.[81] A committee of the school board, conducting a disciplinary hearing at which the student and his parents spoke, voted unanimously to recommend expulsion for the remainder of the academic year. [82] Although the school system offered home-based tutoring,[83] the student appealed to an administrative hearing pursuant to the Act[84] and apparently remained in school awaiting the outcome.[85] Finding for the student, the hearing officer ruled that expulsions were proper only if a student was dangerous or an emergency existed.[86] The Mississippi Supreme Court counseled restraint in expelling students for handicapped-induced misbehavior, emphasizing that schools should first consider less harsh forms of discipline or a change in the child's placement.[87] Expulsions were appropriate, the court found, if the school offered the handicapped student alternate services during the expulsions.[88] Consideration of appropriate punishment, of course, should

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Fifth Circuit remanded the case for a determination of appropriate compensation. *Id.*

[79] *Jackson*, 765 F.2d at 538.

[80] 508 So. 2d 1081 (Miss. 1987).

[81] *Id.* at 1083. The incident occurred March 26, 1984, at Pascagoula High School. *Id.*

[82] *Id.* The student maintained at the hearing that he obtained the marijuana from another student, planning to trade it for knives to add to his collection. *Id.*

[83] *Id.*

[84] *Id.* The Mississippi Department of Education appointed Dr. J. Larry Tyler to conduct the hearings. *Id.*

[85] *Id.* at 1084. The court noted that the student remained in school in compliance with Act regulations codified at 34 C.F.R. § 300.513 (1988). *Id.* at 1084.

[86] *Id.* The officer also considered the expulsion moot since the academic year had ended before the hearing. *Id.* The education state review team affirmed the decision, awarding the student credit for passing grades he had earned since the attempted expulsion. *Id.* The Chancery Court of Jackson County dismissed the school's appeal, ruling that state courts have no jurisdiction under the Act. *Id.* While the case was on appeal to the Mississippi Supreme Court, the student graduated in 1986. *Id.*

[87] *Id.* at 1085. The Act commanded that before expelling a student, school personnel should isolate a handicap as the cause of unruly behavior. *Id.* (quoting S-1 v. Turlington, 635 F.2d 342, 348 (5th Cir. 1981)). If the handicap caused the misbehavior, school authorities should consider a change in placement or less drastic method of discipline before resorting to expulsion. *Pascagoula*, 508 So. 2d at 1085 (quoting School Bd. v. Malone, 762 F.2d 1210, 1217 (4th Cir. 1985)).

[88] *Pascagoula*, 508 So. 2d at 1085. The *Pascagoula* court relied on the Fifth Circuit's

begin with a determination of whether the misconduct flowed from the handicap, the court stated.[89] The court noted that since the student had already graduated, denial of a diploma would not improve discipline.[90] The importance of the *Pascagoula* case, the court maintained, was its precedential value for school and judicial officers in Mississippi.[91]

In the instant case, the United States Supreme Court reasoned that since respondent was twenty years old, had not finished high school, and still lived in California,[92] the Court should have afforded him the benefits and protection of the Act.[93] The Court stated that the congressional intent of the Act constrained it to adjudicate the rights of the respondent.[94] According to the Court, Congress passed the Act to prevent schools from exercising exclusionary practices against hand-

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decision in Jackson v. Franklin County School Board that a school could expel a handicapped student as long as it based the expulsion on a "reasonable conclusion" and provided "quality educational services" in the interim. *Id.* (citing Jackson v. Franklin County School Bd., 606 F. Supp. 152, 154 (S.D. Miss), *aff'd*, 765 F.2d 535 (5th Cir. 1985)).

[89] *Pascagoula*, 508 So. 2d at 1085.

[90] *Id.* Overturning the chancery court decision to the contrary, the court also ruled that state courts have jurisdiction in suits under the Act. *Id.* at 1084. Therefore, Mississippi courts could review both the administrative records, as well as additional evidence during appeals under the Act. *Id.* at 1085. *See* Town of Burlington v. Department of Educ., 736 F.2d 773, 790 (1st Cir. 1984)(finding that additional evidence should be limited to information that only supplemented administrative records or described events that occured after administrative hearings).

[91] *Pascagoula*, 508 So. 2d at 1085.

[92] Honig v. Doe, 108 S. Ct. 592, 601 (1988). The United States Supreme Court reasoned that these qualifications entitled Smith to a "free appropriate public education" in the state of California under the Act. *Id.* Concluding that there was a "reasonable expectation" that courts would again subject Smith to a unilateral "change in placement" for conduct resulting from his handicap, the Court found the instant controversy "capable of repeition, yet evading review", and, therefore, not moot. *Id.* at 601-02.

[93] *Id.* at 601. The Act's protection and benefits were for disabled children between the ages of three and 21. *Id.*

Chief Justice Rehnquist in a concurring opinion addressed the mootness issue, suggesting that the Court should either abandon the doctrine of mootness altogether or at least relax the doctrine in cases at the Supreme Court level. *Id.* at 607-09. *See* Singer, *Justiciability and Recent Supreme Court Cases*, 21 ALA. L. REV. 229, 262, 268 (1968)(advocating abolition of mootness doctrine). In a dissenting opinion joined by Justice O'Connor, Justice Scalia asserted that the instant case was moot, not meeting the limited criteria of a dispute "capable of repetition, yet evading review." *Honig*, 108 S. Ct. at 609. *See generally* Note, *The Mootness Doctrine in the Supreme Court*, 88 HARV. L. REV. 373, 386 (1974)(discussing recognition and application of "capable of repetition yet evading review" exception to mootness doctrine).

[94] *Honig*, 108 S. Ct. at 604.

icapped children without providing alternative education to the students or notice to their parents.[95] The Court explained that parental participation was an integral part of the Act and that the Act effectively barred schools from changing the educational placement of a handicapped child over a parent's objection prior to the conclusion of all review proceedings.[96] Evaluating the language of the Act, the Court said that while it was obvious that Congress had intended "to strip schools of the unilateral authority" to exclude disabled and emotionally disturbed students from school, it was also obvious that the schools were not powerless when faced with a dangerous student.[97] After close analysis of the congressional intent of the Act, the Court refused to recognize the "dangerousness exception" to the Act's "stay-put" provision claimed by the petitioner.[98] Finding no exception to the "stay-put" provision of the Act, the Court concluded that school officials' failure to seek review or parental consent before indefinitely suspending the student constituted a "change in educational placement" and a violation of the "stay-put" provision.[99]

With its decision in *Honig v. Doe*, the United States Supreme

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[95] *Id.* The Court indicated that Congress passed the Act upon finding that schools nationwide excluded one out of every eight disabled children from their classrooms. *Id.* The purpose of the Act, as discussed by the Court, was to require "participating States to educate all disabled children, regardless of the severity of their disabilities." *Id.*

[96] *Id.*

[97] *Id.* at 604-05. The Court interpreted the Act as requiring schools to use normal procedures for dealing with children who endanger themselves or others, including drastic measures such as a ten-day suspension. *Id.* at 605. Additionally, the Court determined that the Act allowed interim placement of a student where the parents and school officials agreed on the student's removal. *Id.* Alternatively, parents or school officials could expedite the placement of a handicapped child by seeking injunctive relief on a showing of the futility or inadequacy of administrative proceedings. *Id.* at 606. In such cases, the moving party would bear the burden of proving that administrative review proceedings would be futile or inadequate. *Id.*

[98] *Id.* at 604. *See supra* notes 6 and 9. The Court concluded that despite Congress' awareness of the danger involving some of the students covered under the Act, it included no "dangerousness exception." *Honig*, 108 S. Ct. at 604-05. Finding that such an omission must have been intentional, the Court refused to create such an exception. *Id.* at 605.

[99] *Honig*, 108 S. Ct. at 604-07. The Court again stated that the school could have sought injunctive relief in the case of dangerous students. *Id.* at 605. In such a suit, the school had to overcome a presumption favoring the school's current educational placement. *Id.* at 606. Additionally, the court, in which injunctive relief was sought, had to use a balancing test to decide whether or not to enjoin the student's school attendance. *Id.* This balancing test would weigh the student's "right to a free appropriate public education" against the school's interest in maintaining a safe learning environment for all its students. *Id.*

Court gave guidance to school officials and handicapped students in Mississippi and throughout the nation concerning their rights under the Act.[100] The most important part of the opinion refused to recognize a "dangerousness exception" to the "stay-put" provision of the Act.[101] This refusal effectively overruled the Fifth Circuit's *Jackson v. Franklin County School Board* as well as the Mississippi Supreme Court's *Pascagoula Municipal Separate School District v. Doe.*[102] School officials will no longer be able to expel or suspend handicapped students for misconduct in the same manner as non-handicapped students.[103]

The highest court in the land has ruled that handicapped students must be afforded special due process rights under the Act before changing their placement. Firstly, school officials can no longer validly argue that they have a duty to remove a dangerous handicapped student immediately.[104] Secondly, school systems will be forced to adapt their classes and teaching methods to meet the special needs of handicapped students as well as rewrite their disciplinary policy to adhere to the Court's ruling that there is not a dangerous child exception.[105]

Additionally, the *Honig* decision has advised school officials as to their rights when faced with a dangerous student.[106] Schools may now seek injunctive relief *before* going through all exhausting and often futile administrative proceedings.[107] However, schools must be aware of the presumption in favor of the student's current educational placement.[108]

Although difficult to estimate the number of handicapped students affected by the Court's ruling, clearly there will be immediate ramifications of the *Honig* decision. The primary impact, however, will be borne by schools forced to teach handicapped students in an environment with their peers, rather than excluding or suspending them based on a "dangerousness exception."[109]

Richard Kent

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[100] *See supra* notes 97, 98, 99 (indicating Court's rejection of "dangerousness exception" and school's right to injunctive relief).

[101] *See supra* note 98 and accompanying text.

[102] *See supra* notes 73-90 and accompanying text.

[103] *See supra* notes 23 and 64.

[104] *Honig*, 108 S. Ct. at 604-05.

[105] *Id.*

[106] *See supra* note 99 and accompanying text.

[107] *Id.*

[108] *Id.*

[109] *See supra* notes 23 and 64.

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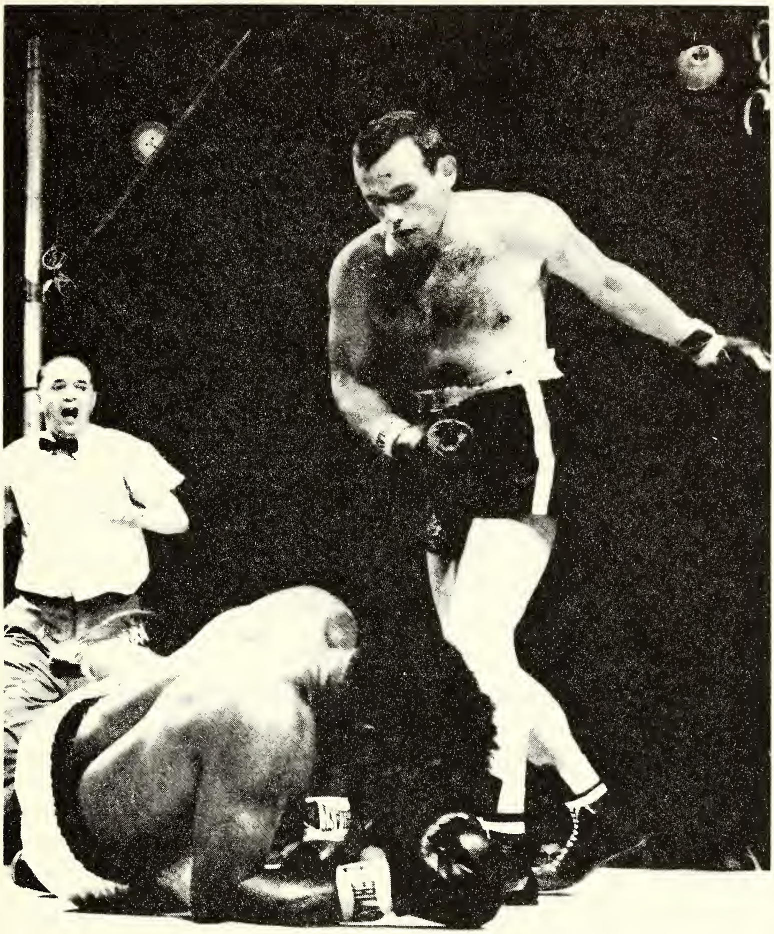

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DEDICATION

*Aaron S. Condon**

Professor Aaron S. Condon will retire from the faculty of the University of Mississippi School of Law at the close of the Spring 1989 term. His influence as a teacher and a colleague will be sorely missed by students and faculty alike.

Aaron joined the law school faculty in 1966, coming from private practice in Kosciusko, Mississippi. He quickly became recognized as a wit and a philosopher - homespun or otherwise. He regaled us with stories of "providence," possum neck, and the legion of fascinating people he has known in his lifetime. We all learned that Aaron is a living oxymoron: a man who loves the military and abhors discipline; a teacher with the softest of hearts who gives the lowest of grades; and an intellectual who easily relates to the rural and uneducated that he encounters. He is, indeed, a rare specimen.

Perhaps Aaron's most telling attribute is his willingness to do whatever is required to help others. As he once said, when agreeing to undertake a certain distasteful assignment, "If you need someone to play second base, I'll play second base." There is no way to guess the number of law students who have been helped, materially and otherwise, by him. He has seen to their needs in the hospital, extricated them from problems with the authorities, and given them the benefit of his time, intellect and effort in dozens of other ways.

After twenty-three years on our faculty, he has hung it up. I believe that I speak for everyone connected with the law school when I say that we are better off because our paths have run parallel to his for so long a time. "Doc," we hate to see you step down, and we hope that you won't become a stranger.

---

* Aaron Storer Condon, originally from Kosciusko, Mississippi, received his B.A. from the University of Alabama in 1950. He subsequently gained his J.D. from the University of Mississippi in 1952. Mr. Condon is a retired colonel of the United States Army Judge Advocate General's Corps, having served from 1946-47 in Belgium and Germany and from 1952-55 in Japan. He returned to private practice in Kosciusko in 1957 and remained there until 1966. During this time, he served as County Attorney for Attala County from 1960-66.

Mr. Condon began his tenure at the University of Mississippi School of Law in 1966 as an assistant professor of law. He became an associate professor of law in 1970 and was promoted to full professor of law in 1972. Over his distinguished career, he has taught Civil Procedure, Criminal Procedure, General Practice, Mississippi Circuit Court Practice, Mississippi Practice, Readings in Law, and Torts.

He and his wife, Lillene, have two daughters. They are Catherine Condon Lassiter, an attorney in Little Rock, Arkansas, and Carol Condon, a paralegal in Nashville, Tennessee.

William M. Champion

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THE LECTURE

The Overton and Lavona Currie Lecture Series was established in 1988 by Overton Anderson Currie, a 1949 honor graduate of The University of Mississippi School of Law, and his wife, Lavona. Mr. Currie, a native of Hattiesburg, Mississippi, attended Marion Institute (Alabama) before receiving a B.B.A. from The University of Mississippi in 1948. Throughout his undergraduate and law school years, Mr. Currie was very active in extracurricular activities as well as achieving academically. He served on the Moot Court Board, was associate editor of the *Mississippi Law Journal*, and graduated valedictorian of his law school class.

After practicing law and serving as county prosecuting attorney in Hattiesburg for six years following law school, Mr. Currie did graduate work at both Columbia Theological Seminary and Emory University Divinity School. He received an LL.M. degree from Yale, where he also took courses at the Yale Divinity School and the Yale Medical School.

Overton Currie is now a partner in the Atlanta law firm of Smith, Currie and Hancock, where he specializes in construction law. Mrs. Currie is the former Lavona Stringer of Booneville, Mississippi. The Curries have four childrenn.

Reflecting Mr. Currie's impressive academic background and wide-ranging interests, the Lecture Series is intended to be interdisciplinary in nature and to expose students to a broad range of knowledge and ideas.

LAWYERS AS ASSIMILATORS AND PRESERVERS*

Thomas L Shaffer[**]
with Mary M. Shaffer[***]

> In one sense he is the salt of humanity with his tremendous energy and ambitions. But being salt, he gives humanity high blood pressure. He's neither a real Jew nor a real Gentile. He has no roots in any group. He digs all the time in other people's soil, but he never reaches any roots. He tries consciously and subconsciously to wipe out the individuality of nations and cultures. Like those who built the Tower of Babel, he often tries to transmute the whole world into one style. He often preaches a sort of liberalism which is false and is the opposite of liberal. The worst thing about the assimilationist is that he has no pride. He always wants to be where he is not wanted . . . . The idea of roots is not to deny anything. You have to make the best of your origin and your upbringing. You did not grow up in a vacuum . . . . If you are going to write a cosmopolitan novel, just about a human being, you will never succeed, because there isn't such a thing as 'just a human being.'
>
> *Isaac Bashevis Singer*[1]

The United States, more than most nation-states, has a history of confrontations between one culture and another, and of law as a means of ending cultural confrontations. Again and again in America, our dominant Anglo-Saxon Protestant culture has dealt with an alien culture and, as the story is usually told, overcome it. The dominant culture has used the law to bring the vulnerable culture into conformity to what we have referred to as "the American way."

---

* A shorter version of this paper was presented as the inaugural Overton and Lavona Currie Lecture at the University of Mississippi School of Law, February 15, 1989.

** B.A., J.D., LL.D.; Robert and Marion Short Professor of Law, University of Notre Dame; member of the Indiana Bar.

*** B.A., University of Virginia. Mary M. Shaffer studied at the Universities of Siena and Pavia and taught in Italy, 1985-1988; she is a graduate student in Italian literature at Johns Hopkins University.

[1] I. SINGER AND R. BURGIN, CONVERSATIONS WITH ISAAC BASHEVIS SINGER 63-64 (1985).

This has been true where the vulnerable culture came to us-as was true of the African slaves and of the European immigrants who came to farm the Midwest and to tend the machinery of the industrial Northeast. It has been true also when the dominant culture was the invader, as was the case, all over the continent, when our European ancestors settled in territories populated by native Americans — from the commercial adventurers of the Southeast, to the Pilgrims in Massachusetts Bay, to the Conquistadores among the Navajo, to Father Junipero Serra among the Indians of California, to my pioneer ancestors among the Arapaho of central Wyoming.

Coercive law has been the means of domination, more than overt force, in all of these cases; cultural domination has been turned over to lawyers more often than it has been turned over to soldiers. In most cases lawyers have served the function soldiers would have: The professional mission was conquest. Law was force used by the dominant culture, and lawyers were the legions of the law. If the dominant society has sometimes become liberal toward the conquered, the result in the American case — unlike that of the Romans or biblical conquerors — is that the law dealt with the individual, not with the conquered culture. Our liberal jurisprudence speaks in terms of individual rights — rights not of a culture or a people, but rights of individuals who are considered one at a time, and dealt with in terms defined by the individualistic law and morals of the dominant culture. That was true of the nation-state's treatment of the Mormon culture that found biblical warrant for the practice of polygamy in the 19th century;[2] it has been true, so far, of Indian tribes that use hallucinogens in religious ritual;[3] it was true a few years ago of a Jewish military chaplain who wanted to wear a yarmulke under his military hat.[4]

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[2] Reynolds v. United States, 98 U.S. 145 (1878). *See* Kendall White's brief discussion in S. Hauerwas, S. Levinson, and M. Tushnet, *Faith in the Republic*, 45 WASH. AND LEE L. REV. 467, 492 (1988) (hereinafter *Faith in the Republic*).

[3] Oliver v. Udall, 306 F.2d 819 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 808 (1963).

American constitutional law deals with vulnerable cultures in terms of the rights of individuals. It ignores or at least bypasses cultures by focusing on the individual as if he were the cause of his own culture. But the law's narrow focus on rights does not dispose of cultures; the law can only pretend that cultures are absent. Judge Learned Hand, for example, wrote some of the opinions for the federal court of appeals in a series of cases involving a clause in the immigration statute that says an immigrant applying for citizenship is required to demonstrate that he has "good moral character."[5] Such cases raised the cultural question of what character means, and often involved a confrontation between two cultures. They involved evidence of mercy killing,[6] or living with a person of the opposite sex without benefit of marriage,[7] of visits to prostitutes,[8] and, in one case, an applicant who had married his niece[9] — a practice that was not considered immoral in his immigrant culture but was immoral so far as the executive branch of the federal government was concerned.

These situations were typically situations in which the dominant culture had already prevailed: The marriage to a niece, for example, was illegal and invalid, as much as a polygamous Mormon marriage would have been. The issue was what good moral character meant; there were at least three ways available to impose the dominant culture's position on what good moral character meant: One would have been to consult public opinion. Hand declined to do that; he thought it wasn't judicial. He consulted precedent and judicial instinct instead, as more appropriate to his office. A second method, one suggested to him by a law review editor, would have been to claim universal validity, "immutable objective morality," for American culture;[10] Hand did not discuss that, but there was warrant for it in the precedents. The third method would have spoken of a right to a cultural view of marriage — saying, in effect, that such a marriage is not allowed but a person has a right to believe privately that it should be; the individual has that private right. Character requirements cannot intrude into that privacy.

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[4] Goldman v. Weinberger, 475 U.S. 503 (1986). *See* Mark Tushnet's discussion in *Faith in the Republic*, at 470-71.

[5] Note, *Aliens — Naturalization — Good Moral Character as a Prerequisite*, 34 NOTRE DAME L. REV. 375; *see* J. O'Meara and T. Shaffer, *Obscenity in the Supreme Court: A Note on Jacobellis v. Ohio*, 40 NOTRE DAME L. REV. 1, 6 n.13, 10 n.23 (1964); Special Project, *Jurisprudence — Naturalization — Moral Standard*, 33 MARQ. L. REV. 202 (1950).

[6] Repouille v. United States, 165 F.2d 152 (2d Cir. 1947).

[7] Petitions of Rudder, et al., 159 F.2d 695 (2d Cir. 1947); *see also* Estrin v. United States, 80 F.2d 105 (2d Cir. 1935).

[8] Schmidt v. United States, 177 F.2d 450 (2d Cir. 1949)(discussing United States v. Manfredi, 168 F.2d 752 (3d Cir. 1948)).

[9] United States v. Francioso, 164 F.2d 163 (2d Cir. 1947).

Judge Hand can be read to have taken the third alternative.[11] He can also be read to have taken the vulnerable immigrant culture into account in deciding what good moral character meant. He was reactively calm in such cases — he usually ordered the government to grant citizenship — perhaps because he saw himself, a lawyer and a judge, standing between two cultures and having to deal with the morals of each, rather than as a dispenser of rights to individuals. The possibility suggests what I would like to talk with you about — the lawyer, not as an agent of conquest, a manager of the law of the dominant culture as a means of security from the vulnerable culture, but as a legal professional who stands between two cultures and uses his or her professional status as a way to fit them together.

A rather different example here is the group of black civil-rights lawyers that gathered in the 1930s and 1940s around Dean Charles Hamilton Houston: Thurgood Marshall, Spottswood Robinson, William Hastie, James W. Nabrit, Jr., Robert L. Carter and Oliver W. Hill. They were the architects of a stunning change in American constitutional law. It took years of wary, wily, patient lawyers' work in scores of cases.[12] It was an argument over three decades, and it was an argument between cultures. Although we talk of it as a matter of rights, it was at its deepest not that at all. It was argued in those terms because it had to be; that was the category laid down by the dominant culture.

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[10] *See* Special Project *supra* note 5.

[11] *See supra* note 6; *compare* In re Spenser, 22 F. Cas. 921 (D. Oregon 1878).

[12] R. KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1975); G.R. McNeil, *Charles Hamilton Houston: Social Engineer for Civil Rights*, in J.H. FRANKLIN & AUGUST MEIER, BLACK LEADERS OF THE TWENTIETH CENTURY 221-240 (1982), excerpted in T. SHAFFER, AMERICAN LEGAL ETHICS 546-55 (1985).

But this movement, from the *Gaines* case in 1938 through the last of the education cases in the 1970s, was an argument not for individual rights but for participation in America by a culture of oppressed people.[13] That is why integrated education was critical in Dean Houston's view: The law's task, as he saw it, was to fit two cultures together. It would not have been enough to confer rights on the individual black person. Neither Houston nor the great prophet of the movement, Dr. King, argued from Hobbs and Rousseau; Dr. King argued from the Bible.[14] Black people in America are, like biblical Israel, a people.[15]

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Let me see if I can pose this proposition with a couple of anecdotes. I am a descendant of frontier women and cowboys. I am the only male in three generations in my family who is not a cowboy (and my wife sometimes wonders about me). All four of my grandparents and four of my great-grandparents homesteaded in Montana, Wyoming, and Colorado. My maternal grandfather was one of the first law-enforcement officers in Hot Springs County, Wyoming. As far as I can tell, he was the very first who was earnest about bringing law and order to Thermopolis, a little cow town that, in those days, had more saloons than it had churches. My parents' people were Baptist settlers; they went to churches, not to saloons; they sank roots and tried to make a living from raising the gentle, durable little Hereford cattle that British investors imported into the Mountain West at about the time my ancestors settled there.

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[13] I am grateful for the unpublished scholarship of Steven Hobbs on this point; see my brief discussion of it in Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697, 699 (1988).

[14] J. MCCLENDON, JR., BIOGRAPHY AS THEOLOGY: HOW LIFE STORIES CAN REMAKE TODAY'S THEOLOGY 265-286 (1974).

[15] And, like Moses, Dr. King said to the dominant culture: Let my people go. Kluger, *supra* note 12, at 128. " 'Frankly,' says a Howard law graduate who went on to become a federal judge, 'the purpose there then was to learn how to bend the law to the needs of blacks.' Beyond that . . . was Houston's belief that a law case was a splendid opportunity to lead and teach the black population in whatever community the case arose." The Dean was so earnest in this that he had at first preferred to avoid the federal courts and argue his cases before local judges and juries — i.e., to argue them as confrontations between cultures rather than as matters of federal constitutional right.

The Herefords shared those mountains and prairies with native wild life; the cows and the settlers had to learn to share their world with creatures who were there first. You may remember Jim Burden's grandmother, in Willa Cather's *My Antonia*, deciding to put up with the badger in her garden, even though, as she put it, "He takes a chicken once in a while, but I won't let the men harm him. In a new country a body feels friendly to the animals. I like to have him come out and watch me when I'm at work."[16] But the settlers also took what God had provided for them in nature: They killed the animals they needed for food, when they needed food. I can remember going for two weeks with our neighbor, who had a summer ranch in the mountains: We took some flour, sugar, baking powder, and a bag of apples, but no meat. The first thing we did when we got to the summer camp with our pack horses was to kill a deer.

We had, even as late as my childhood in western Colorado, a settled, white-man's frontier culture. The dominant culture had come to it, much as the Pilgrims had come to Massachusetts, and there were confrontations. Game and fish laws are an example; with those laws came peace officers who had the power to arrest a cowboy who killed a deer for his summer food — out of season, without a license, and when he was not wearing the prescribed clothing.

Farrington Reed Carpenter tells of coming in 1912 from the Harvard Law School to practice law in the town of Hayden, in Routt County, Colorado.[17] Hayden is a cow town, still under 2,000 in population, on the road from Steamboat Springs to Craig, not far from where I grew up. The first thing Carpenter says he noticed in Hayden, an event that had a lot to do with his learning to practice law there, was a confrontation between the dominant culture and the vulnerable culture. The dominant culture came to town in the person of a game warden named Hobson. He came from eastern Colorado, settled in a bit, and obtained from Denver official credentials that empowered him to enforce the game and fish laws. Officer Hobson arrested a rancher named Matt Gates, at Gates' ranch, on the charge of having there killed three sage chickens out of season.

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[16] W. CATHER, MY ANTONIA 17 (1918).

[17] F. CARPENTER, CONFESSIONS OF A MAVERICK: AN AUTOBIOGRAPHY (1984). The excerpt I use here, which is reproduced in my AMERICAN LEGAL ETHICS, at 530-35 (1985), was first published at 8 COLORADO LAWYER 212 (1979).

"News of this arrest spread like wildfire and aroused great indignation all over the county," Carpenter said. "Many of the inhabitants felt they had a constitutional right to shoot sage chickens any time they wanted to on their own land, for their needs. A committee of the most prominent citizens . . . tried to persuade James C. Gentry, the District Attorney, to dismiss the case. When Mr. Gentry refused, they came back predicting that he would be overwhelmingly defeated at the next election.

"On the day the case was called in the . . . log cabin courthouse, the room was crowded with concerned spectators . . . . Officer Hobson took the stand, and Mr. Gentry had him tell what he had seen the accused do. Finally, Gentry asked him, 'Are you sure it was sage chickens that were killed?'

" 'Yes,' answered the witness, 'I took possession of them as evidence, and placed them in a gunny sack in the vault of the Courthouse. They are here with me today.'

" 'Show them to the jury,' demanded Mr. Gentry in a stentorian voice. The witness carefully emptied the sack in front of the jury.

"Three dead owls fell out.

"Hobson turned plaintively to the Judge and said, 'Your Honor, someone has played a joke on me' . . . . Against a background of feet shuffling on the floor, the Judge beckoned the Sheriff and ordered him to escort the witness out of the courtroom."

"The Sheriff took Hobson out the back door and he was never seen again in Routt County," Carpenter says. He leaves us to our own conclusions as to how the owls got into the gunny sack. I think we are free to guess that the District Attorney knew the answer. He was a lawyer standing between cultures. Maybe he manipulated the facts a bit, as Faulkner's Gavin Stevens, Mississippi county attorney, did in similar cases.[18]

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[18] I have in mind the episode in which bootleg whiskey is found in Montgomery

The other anecdote comes from Utica, New York. In the first few years of this century — a decade before Farrington Carpenter went from Cambridge to Hayden to practice law — there was in Utica, as in many American cities, a community of immigrants from southern Italy. There were a couple of Italian-language newspapers published there, both of which carried items of local interest to those who could read Italian or had someone who could read it to them. One was called *L'Avvenire*; the other was *La Luce*. There is a series of stories in those papers about an immigrant who stood between the two cultures in Utica — a man named Nick Camelo.

Signor Camelo was, functionally, as much a lawyer as James Gentry in Hayden or Gavin Stevens in Jefferson, Mississippi — although Camelo was not educated or licensed to be a lawyer. Nick Camelo first appears in the news in 1900, when he was elected secretary of a company that manufactured liqueurs.[19] He appears again in 1902 when he was nominated by both police and fire commissioners to be *speciale polisie della citta di Utica*, a representative to these agencies, apparently, from the Italian community. The writer for *L'Avvenire* said the commissioners could not have chosen a better person "than this fine young man who willingly lends himself for the good of all."[20]

The same paper reported the next year that Camelo had managed to get one Michele Lombardi out of prison. Signor Lombardi was unjustly sentenced, *L'Avvenire* said, by a judge in Greene, New York, on a charge of third-degree assault. He was accused by his wife Carmela of, as the newspaper reported it, *aggressione*. "Young and valiant Nick Camelo," the story said, was able to obtain an annulment of the sentence and Lombardi's liberation from prison.[21] *La Luce* reported the same story and added the fact that it had cost Camelo two hundred dollars[22] —

Ward Snope's back-alley picture room, with the consequence that M.W. is sent to the state penitentiary instead of federal prison. W. FAULKNER, THE TOWN 154-76 (1957) (ch. 10)(Vintage ed. 1961). Faulkner dedicated the novel to Oxford lawyer Phil Stone: "He did half the laughing for thirty years." *Id.*

[19] L'Avvenire, Nov. 10, 1900.

[20] L'Avvenire, Jan. 11, 1902.

[21] L'Avvenire, Jan. 10, 1903.

[22] La Luce, Jan. 10, 1903.

the paper didn't say to whom the money was paid or where Camelo got it. He was functioning according to the dominant culture's requirements, but possibly with the methods and values of the vulnerable culture. He was clearly functioning as a lawyer.

In 1904, *L'Avvenire* reported that Camelo had defended an Italian immigrant who was stopped on the street, taken to prison, and fined fifty dollars. This person was unable to pay the fine and had been in prison fifty-nine days before Camelo learned about him.[23] Camelo had, by this time, apparently left the liquor business and was operating as a notary public and banking and steamship agent for families who sought to bring relatives to this country from Italy. He was also working as an interpreter in the city court, the paper said.[24]

Camelo was asked to run for alderman in Utica in 1905; he declined, but he said he would continue to listen to his people.[25]

* * *

We propose to look more closely at the situation displayed in these stories from Hayden and from Utica, to look at the lawyer as he stood in these stories between a dominant culture and a vulnerable culture. We want to suggest that such a legal figure has two ways of using his legal power to deal between cultures — ways that are different in their effect on both cultures. One way is to conform the vulnerable culture to the dominant culture: We will call that the way of *assimilation*.[26]

The other way is to protect the vulnerable culture and, as the lawyer manages to locate openings in the law and politics of the time, to manipulate the dominant culture into coming to terms with the vulnerable culture. We will call that the way of

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[23] L'Avvenire, Feb. 10, 1904.

[24] L'Avvenire, Sept. 12, 1903; Feb. 20, 1904; June 11, 1904.

[25] L'Avvenire, Aug. 26, 1905.

[26] I OXFORD ENGLISH DICTIONARY 510 (1933) gives five definitions of assimilation: (1) the state of being like, or similarity, resemblance; (2) the action of becoming conformed; (3) the acknowledgement of likening; (4) "conversion into a similar substance," which is physiological but also metaphorical, as in Burke's reference to "the sentiments which beautify and soften private society"; and (5) the change of bodily fluids after death, into "the nature of any morbific matter" (pathology), a usage that has metaphorical promise for the thesis of this paper.

preservation. In America, both methods have resulted in substantial freedom for the individual in the vulnerable culture, but the freedom that has resulted from assimilation has been a freedom expressed in theories of rights, and therefore a freedom that belongs to the individual without regard to his culture. He is, in one way of putting it, free to believe in his old vulnerable culture or to abandon it. If the vulnerable culture is in some way preserved in him, or through him, it is not because the culture has value but because the individual has rights.

The freedom that results from the preservation of culture is different ethically and politically: If the vulnerable culture is preserved rather than assimilated, it is usually because the dominant culture accords it value and — to use a word the Italian immigrants used — respect. That means the dominant culture has rendered itself vulnerable: It has put itself in a position to learn from the vulnerable culture. It is in danger of change as a result of what it learns. (The Civil Rights Movement's partial success is, again, the most prominent modern American example.)

I. TWO MODELS

About a decade after Nick Camelo told the voters of Utica that he would prefer not to be an alderman, but would continue to listen to his people, Salvatore A. Cotillo functioned in a licensed capacity as a lawyer in Little Italy, in Harlem. Cotillo was a preserver. I want to linger over his story. It is available in English.[27]

Cotillo's family emigrated from Naples in 1892, when Salvatore was six years old. He went to school in New York. He earned a law degree from Fordham in 1911 and was admitted to the New York Bar in 1912. He would later be the first Italian-American to serve in either house of the New York Legislature (he served in both), and the first to sit on the bench of the New York Supreme Court. But in the days when he was acting as

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[27] N. FERBER, A NEW AMERICAN: FROM THE LIFE STORY OF SALVATORE A. COTILLO, SUPREME COURT JUSTICE, STATE OF NEW YORK (1938)(hereinafter FERBER); T. Henderson, *Immigrant Politician: Salvatore Cotillo, Progressive Ethnic*, 13 INT'L MIGRATION REV. 81 (1979); *cf.* SALVATORE A. COTILLO, ITALY DURING THE WORLD WAR (1922).

Nick Camelo had in Utica, he was a lawyer practicing in the street in front of his father's gelato and pastry shop on East 116th Street.

Cotillo was a scrivener for his clients, most of whom could not read or write in either language. "He was . . . required to translate intimately personal letters, business papers and legal documents," his biographer says. "Neighbors and friends sought his aid in the preparation of applications for various licenses, or petitions on behalf of their relatives who wished to emigrate to the United States. Cotillo served an apprenticeship in human problems . . . ."[28] Cotillo was the only lawyer in the neighborhood; his biographer says there were forty or fifty Italian-American lawyers working there thirty years later.[29]

Cotillo, like Camelo, advised and represented his clients as they faced the world outside their Italian neighborhood. "Many problems were personal; but some had a community aspect and Cotillo was exhilarated by the challenge they offered to find a solution . . . . An earnest group of the more frequent callers regarded him as their leader in planning for the realization of a better life for their immigrant neighbors."[30]

One way to put the comparison of assimilation and preservation is to ask a question about this "better life," a question also about what *L'Avvenire* meant when it said Nick Camelo, although he had been *speciale polisie*, declined nomination for alderman and said he would continue to listen to his people. These lawyers interpreted one culture to the other. When they were willing to mute or even renounce the power they had to serve the conquerors, they interpreted powerless cultures to powerful cultures. Signori Camelo and Cotillo in this way interpreted the Protestant and Irish-Catholic, English-speaking cultures of Utica and New York City to the vulnerable Calabrian and Sicilian cultures Southern Italians brought to the United States when they came here, eighty years ago, looking for work. And, more significantly we think, they interpreted the Calabrians and Sicilians to New York.

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[28] *See* N. Ferber, *supra* note 27, at 19.

[29] *Id.*

[30] *Id.* at 21.

There is probably a hope, when lawyers interpret in the way Camelo and Cotillo did, that they or their descendants can achieve a cultural synthesis, that they can *put* the cultures together, rather than *fit* them together. There is a hope that the need for interpretation will disappear, because the differences between the cultures will disappear. That, I take it, was the romantic American dream of the melting pot. American lawyers, no doubt, often did what they did because they thought of themselves as guardians of the melting pot. Arthur Miller's Italian-American lawyer, Mr. Alfieri, was a guardian of the melting pot. Marco, the illegal immigrant who had, as we say, taken the law into his own hands, said to Mr. Alfieri, "All the law is not in a book." "Yes," Mr. Alfieri said. "In a book. There is no other law." Mr. Alfieri was an assimilator, and it was important to him that Marco know who wrote the book. Marco had to be conquered; his culture had to become irrelevant. Mr. Alfieri was the servant, not of Marco's culture, but of Marco's rights.[31]

We are going to pass by this melting-pot possibility. We do so for moral reasons. The melting pot meant what Officer Hobson meant when he arrested Matt Gates at the Gates ranch near Hayden — not that the game laws would adjust to ranchers (they never have) but that ranchers would stop shooting sage chickens out of season.

In our opinion, the melting pot is not a desirable possibility; it never was. It was a product of Anglo-Saxon imagination. It did not honestly hope for a synthesis of cultures in America. What "melting pot" meant to Italians who came here at the time Camelo and Cotillo did was that they would melt into the republican society Thomas Jefferson and Benjamin Franklin described: God's New Israel, Jefferson called it. President Reagan said as he left office that America is the keeper of the miracle. There is no trace of Italy in such an imaginary republic — no trace of Latin America or Africa or China, either. From an Italian's point this Jeffersonian vision was dishonest, crude, materialistic, and frantic. Italians, and the lawyers who sought to preserve Italian culture in America, were not interested in being melted into that pot. Americans were, as one immigrant put it, a people who eat their fruit green.[32]

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[31] A. MILLER, A VIEW FROM THE BRIDGE 103 (1955) (Bantam ed. 1961).

The principal example we will use of the lawyer as *assimilator* is John Horace Mariano,[33] an Italian immigrant, American lawyer, and sociologist, who published in 1925 a book called *The Italian Immigrant and Our Courts*. He was somewhat more successful in his work — or at any rate somewhat more persuasive — than Game Warden Hobson was in Routt County.

The example we will use of the lawyer as *preserver* is Salvatore Cotillo, immigrant lawyer, Tammany Hall politician, and Italian-American leader. (It might be more fun to use Nick Camelo, but we have told you all we can find out about him, and it's not enough for sound scholarship.)

II. JOHN HORACE MARIANO

Mariano's and Cotillo's vantage points on Italian immigrants confronting American law were substantially identical: Both were in New York City; they were contemporaries. The immigrant families they addressed were in cohesive Italian-American communities; the families they spoke of had immigrant parents and American-born children reaching adulthood as World War I ended. Both Cotillo and Mariano lived and wrote in contemplation of extensive, pervasive prejudice against Italians,[34] and in the last years of open immigration, just before Congress closed the door on Italians in 1924.[35]

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[32] M. LASORTE, IMAGES OF THE ITALIAN GREENHORN EXPERIENCE 147, 195-97 (1985).

[33] Mariano was a psychologist, sociologist, and divorce lawyer, as well as a sometime academic. He died in 1959, at the age of 81, after a long and eminent career in all four disciplines. Two of his books were on psychological problems in marriage; he was counsel for the New York State Psychological Association, for the United Transit Association, and for unions in cases involving the Busch Jewelry Company and its affiliates. He had his education (B.A., LL.B., and Ph.D) from Columbia, and was a member of the New York Bar. The New York Times, Aug. 13, 1972, p. 59 col. 2. His books, for present purposes, include THE ITALIAN IMMIGRANT and OUR COURTS (1925) (hereinafter COURTS), and the ITALIAN CONTRIBUTION TO AMERICAN DEMOCRACY, published in 1921 by the Christopher Publishing House in Boston, and republished in 1975 by Arno Press.

[34] Both FERBER and COURTS document the prejudice against immigrants and their children, as does any responsible social history of Italians in America. *See, e.g.* LASORTE, *supra* note 32; The Center for Migration Studies of New York, Inc., IMAGES: A PICTORIAL HISTORY OF ITALIAN AMERICANS (1981) (includes newspaper cartoons); MUSMANNO, THE STORY OF THE ITALIANS IN AMERICA (1965). The prejudice has not disappeared; it has surfaced in recent political discussions of candidates for national office — Geraldine Ferraro, for example; see the unsigned editorial, ITALIAN MEN, The National Review, Nov. 2, 1984, p. 18; and D. Keith Mano, GERALDINE FERRARO, The National Review, March 28, 1986, p. 67, for two unsubtle examples, and JUDITH ANN WARNER, MARGINALITY AND SE-

Mariano generalized the legal situation as one in which (1) American-born Italian children met the law as delinquents, and (2) Italian families did not turn to the law for protection, for planning, or for rights. In one direction, the social problem Mariano sought to describe was deviance — too much involvement with the law. In the other direction the problem was too little involvement: Individual Italians failed to use American law when they might have used it to ease their adjustment to their new country. Mariano's cure, for both problems, was assimilation.

Mariano said the first generation of Italian-Americans born here were afflicted with a disease. The disease was that they were neither Italians nor Americans. He called them not Italians, but Americans of Italian extraction. Evidence of the disease was that members of this generation were uncommonly present in criminal and juvenile courts.

Mariano's assessment was in two steps (and on each he gave elaborate statistical information): (1) Italian immigrant parents were law-abiding people; the Italian immigrant was not found in the courts, but "his children are met there in overwhelming numbers."[36] (2) These children were not Italians, but they were not Americans either. The cure was *not* to form children in the culture of their parents, but to make them Americans — to keep them from being Italians.

In the first step, Mariano demonstrated that Italian immigrants were law-abiding people.[37] Mariano was vociferous in de-

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LECTIVE REPORTING (doctoral description of the subtle process). FERBER summarizes the situation that Cotillo and Mariano grew up in:

> . . . the olive-skinned, dark-eyed children of Europe's southland were markedly alien breed. . . . Their hands were generally gnarled and stained by grime and soil, hands which fashioned objects, large and small. They performed the heaviest work, burrowing underground in tunnels, erecting sky-piercing, ornate structures, providing healthful sanitation for the many while themselves living under conditions too 'reprehensible' for their so-called betters to contemplate.

FERBER *supra* note 27, at 5.

[35] Immigration Act of 1924, 8 U.S.C. § 145ff (repealed 1952).

[36] *See* COURTS *supra* note 33, at 17.

[37] For example, they were rarely in trouble because of alcohol. Alcohol (wine and

fense of Italian immigrants when, for example, they were said to be unreliable witnesses (and parties) in court.[38] He reacted with umbrage to suggestions by leaders of the American (A.B.A.) and New York bars that Italian-American lawyers and law students lacked the sophistication to carry on the institutions and traditions of American law. ("Is Such criticism just? Hardly!")[39]

So, Mariano asked himself, what was the matter with the first American-born generation? He decided they were not cultural Italians (a disputable assertion at best): "[T]he American of Italian extraction has been born here, passed through our schools and knows little, and appreciates less, of whatever is Italian or pertains to Italian culture."[40] But he was not an American either, or at least not a good American. The schools through which he passed had not (apparently) done for him what school did for Americans whose families had been in this country longer. The schools failed, *but* it was the *families*, not the schools, that had to be reformed.

Mariano thus concluded that the cure lay not in supporting these young people in formation in the law-abiding Italian culture of their parents, but in making them less Italian and more American. For example, three of the commonest juvenile problems among Italian-American children born in this country were truancy, petit larceny, and gambling. (Those may not have been offenses, with the possible exception of petit larceny, in Southern Italy). "A corps of trained and experienced investigators ought to be kept constantly at work on this problem seeking the causes in the different [Italian] homes. . . ." It may be, he said, that Italian children didn't realize the importance of curbing self-expression when it is "tabooed by our man-made [read

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cordials) is, to Italians, food. "[A]buses of it are rarely encountered." *Id.* at 32-35. Among twelve ethnic groups reported on by the Census Bureau in 1910, for juvenile commitments for drunkenness, the Italians were the lowest (Polish the highest). The Italians, Mariano assumes, but does not say, were immigrant children. "The Italian has as much scorn for the individual who debases himself by abusing liquor as he has for the fanatic dry." *Id.* at 35.

[38] *Id.* at 48-49.

[39] *Id.* at 54 (lack of proper regard for the oath).

[40] *Id.* at 51; *see* our "Character and Community: *Rispetto* as a Virtue in the Tradition of Italian-American Lawyers," ____ NOTRE DAME L.R. ____ (1989).

American] laws."[41] Therefore, the cure was to "Americanize" the homes in which the children were growing up; they would learn appropriate reticence from reformed Italian mothers who, he evidently thought, would be like those in Louisa May Alcott stories.

Deeper evidence from the lives of those Mariano was talking about is quizzical — representing, more than anything else, the fact that Italian-Americans of the first generation born in America were ambivalent about being Italians. Helen Barolini's novel, *Umbertina* (1979), describes their painful, hybrid identity through four generations of Italian-American women. Barolini also edited a book of memoirs of Italian-American women, *The Dream Book*, which gives biographical accounts of the situation of Italian-American women. One of these women, Fran Claro, says that the troubles she felt as an Italian-American were the troubles of her mother (a first-generation-born Italian-American). Claro's mother was a person who tried too hard to make herself into an American. She created grief and frustration for her children and for herself. Her story indicates that Mariano was wrong about reforming Italian homes in America, or, at any rate, that he failed to count the cost.

Claro remembers being taken by her grandfather to watch the annual parade of "The Saint" in their community (the major holiday of the year in an Italian-American community). "Oh, how I wanted to be part of that parade," Claro says. "I wanted to be on that float. I dreamed about pinning bills on the Saint. But my mother was becoming an American."[42] Claro's mother cherished stories of Anglo-Saxon American girls, as the teenagers in *Umbertina* learned about America at the Saturday matinees:[43]

> She escaped from her Italian world by reading. *Rebecca of Sunnybrook Farm* became her favorite book. For long hours — after she finished helping my grandmother with younger children and the sewing homework — she would sit and read. Her

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[41] *Id.* at 22.

[42] THE DREAM BOOK: AN ANTHOLOGY OF WRITINGS BY ITALIAN AMERICAN WOMEN 79 (H. Barolini ed. 1985).

[43] *Id.* at 78.

> heroines were fair-skinned, blond-haired, blue-eyed. She could not identify with them, but their world intrigued her. She wanted to absorb the culture of these American heroines. Because her parents were not educated [in American culture] she grew up listening to Italian soap operas and being entertained at street festivals. She rebelled against this gaudy, flashy brand of entertainment. As she grew into adulthood, her childhood dreams of American respectability grew into a determination to separate her children from a culture she had learned to despise. She would never allow her children to get involved with any of the activities which were dear to her parents' hearts. Their culture, she believed, was not one to pass to a new generation.

III. Assimilation and Preservation

Similar evidence, as to both generations, is available in the lives of early Italian-American lawyers. But there is more evidence in those lives of opposite convictions, of the desire to be Italian in America, rather than, as Mariano put it, Americans of Italian extraction. Governor Alfred E. Smith said of Justice Cotillo that he was a giant, steadfast in his ideals, "which are exemplified by his relentless preaching to his fellows that America, their new home, was entitled to nothing less than a 100 per cent undivided loyalty; entitled to their spiritual fealty as well as to the fruits of their physical labor."[44] Ferber's biography of Cotillo, though, paints the picture of a young lawyer, legislator, and judge far more attached to and representative of American-born Italians, and much more at one with them in a cohesive Italian culture, in Harlem's Little Italy, than Governor Smith or Mariano allowed for.

The immigrants and young Italian-Americans of Cotillo's early practice were more often victims of American society (and sometimes of their Italian neighbors) than rebels against it:[45]

> Cotillo's activities in the courts [in his first year as a lawyer] more than ever convinced him that the body politic was too often responsible for the ills of his neighbors. Italian-Ameri-

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[44] *See* N. Ferber *supra* note 27, at vii.

[45] *Id.* at 26-27.

> cans intent on honest employment, even if only at the pushcarts, were told they must pay illicit tribute to get permits. Others seeking berths in the municipal street-cleaning department were asked to pledge themselves to pay weeks and months of their earnings when appointed. Recreation pier concessions were paid for. So, too, were even permits for bootblacks and newsstands. Each had its price. The exploiters, in the main, came from among their own. This racket system preyed on the fears and ignorance of the poor. The victims poured their troubles into the ears of Frank Cotillo and he relayed them to his son.[46]

"Certainly," Frank Cotillo said to his son, "these people ask little enough. They are eager to do the humblest work, by no means in competition with your Americans, and they are asked to pay bribes. Is it any wonder that they resist Americanization?"

"[Y]oung Cotillo set aside several hours of each day and almost all of the evenings to take up the problems of his father's friends," the biographer says. "Above all, he learned, they were puzzled. They could not understand why in this land, where freedom was presumed to await them, they should be denied the right to work. Some were subdued, broken by this interference with their making a livelihood. Others, recalcitrant, called down anathema on the heads of the politicians, officeholders and the commonwealth itself."[47] A few no doubt dealt with their persecutors as Miller's Marco dealt with his: All the law is not in a book.

Mariano's evident view of the immigrant generation was that they could not be Americanized, and therefore had to be survived. Meanwhile they had to learn to trust American legal institutions.[48] He recognized that these immigrants saved from their meager wages toward ownership of their homes and small businesses; he saw that they needed legal services to protect them as they did so. He argued that the Italian immigrants needed to be taught to trust other American institutions as well — courts, banks, land brokers. They would have to turn to these institutions, he thought, if they were to own farms, businesses, and homes.

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[46] *Id.* at 26.

[47] *Id.* at 26-27. There is, here, a cultural difference in the view that freedom implies, or doesn't imply, access to work.

[48] *See*, COURTS *supra* note 33, at 78, 80. Mariano argued that Italian contadini were mistaken in their preference for urban life and the protection of the Little Italies; more of them should be, as they had been in the Mezzogiorno and Sicily, farmers. They would, he said, find farming in America more stable and profitable than farming in Italy had been. 85% had been farmers, or had worked on farms, in Italy; 75% had taken up urban life in this country — 50% in three or four eastern states. *Compare* S. LAGUMINA, FROM

The older generation of Italians in America, Mariano said, suffered from "indifference to our method of righting wrongs."[49] The immigrant's thoughts about American law "need guidance or they will soon lapse from mere indifference into contempt and disdain."[50] The Italian immigrant "needs to be shown that the measure of justice . . . is . . . what the public opinion of his community demands . . . . [H]e should not be allowed to drift into racial communities, forming habits of thot [sic] and ways of thinking that are limited and warped." The fact that the immigrants were law-abiding and respected legal authority (by Mariano's account) should have made it easy for assimilators "to help him adopt an attitude of mind toward our courts, both proper and sane." That this did not work out to be so easy after all was, he said, due to Italian habits of secretiveness in business and family matters; but that, too, would yield to reform. Of course, he said, "the training period for the Italian . . . should be longer than it properly is for others who have no such traditional background to overcome."[51]

Mariano's argument for reforming Italian families resembled Leonard Covello's more famous study of Italian-American school children (those in the first generation born in America). "[I]t is necessary to take into account the adverse influence of the Italian family mores upon the process of formal school edu-

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STEERAGE TO SUBURB: LONG ISLAND ITALIANS (1988). LaGumina argues that the lives of the contadini in Southern Italy were so miserable that return to agriculture in "the land of opportunity" was not likely to be attractive as a way to earn the family's living; but they were attracted, he says, to the Long Island suburbs because homes there provided light, air, and room for a family garden. The 50 suburban communities LaGumina studied are today from 25% to 50% Italian-American and retain an Italian-American cultural character.

[49] *See* COURTS *supra* note 33, at 39.

[50] *Id.* at 41-42.

[51] *Id.* at 41-42.

cation," Covello said, "[T]here is even evidence of collusion between the parents and the child in violating school attendance regulations . . . . The problem . . . would seem to suggest a need to modify Italian family mores — an undertaking which is tantamount to cultural modification . . . a substitution of American patterns for old-world patterns. . . ."[52]

Italian-Americans, when they did get into criminal trouble, Mariano said, tended to commit crimes of violence rather than crimes of stealth. Often, he said, as Miller's Mr. Alfieri would have, such incidents occurred because Italians had an emotional and pressing sense of injustice and applied the law that was not written in books. For such cases, they had to be taught respect, restraint, and patience toward the bureaucratic, laconic, mundane operation of American law enforcement and American courts. "[I]t may be said without fear of contradiction that the Italian is a peaceful, law-abiding, thrifty and home-loving citizen," he said (speaking of the immigrants, again, not of their American-born children).[53] Italians had only to learn that justice can still be justice without "long and impassioned oration" and the absence of uniforms, and can be justice despite the presence of protracted laconic arguments over the admission of evidence, "great importance . . . attributed to the taking of the oath . . . the brusqueness of the court attendants . . . but little show and no seeming authority . . . [and] an entire absence of atmosphere befitting a place where judgments deciding rights, duties, and obligations . . . are permanently passed upon."[54]

The lawyers who would help change these Italian attitudes would not at first be Italians. Italians who were qualified as lawyers in Italy, before emigration, could not function in this country as lawyers. And few Italian immigrants were able to undertake and complete law study in this country.[55] Mariano[56] mentions education, preparation, and cultural difficulties. He does not mention money, but money was undoubtedly a factor, along with the fact that most of the immigrants he refers to were poor Southern Italian peasants — illiterate, wary of institutions, often without training in useful trades — and pervasively discriminated against in America. In any case, there were virtually no Italian-speaking lawyers in the immigrant generation.

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[52] L. COVELLO, THE SOCIAL BACKGROUND OF THE ITALO-AMERICAN SCHOOL CHILD: A STUDY OF THE SOUTHERN ITALIAN FAMILY MORES AND THEIR EFFECT ON THE SCHOOL SITUATION IN AMERICA 406 (1967). Covello's conclusions have been challenged: For an example, see the discussion in T. SHAFFER, *supra* note 40.

[53] *See* COURTS, *supra* note 33, at 17.

[54] *Id.* at 40-41.

[55] A modern instance of that is the St. Louis lawyer Paul B. Rava, who came to the U.S. with his wife and children in 1940, fleeing the anti-Semitism of Nazi-controlled It-

Salvatore A. Cotillo saw the confrontation of immigrant and American law more in terms of power and less in terms of the excellence of American institutions — and he spoke far less of the Italians coming to terms with (as Mariano put it) "our" courts and much more in the language of Southern Italian peasant wisdom.

The barrier was language, Cotillo said. Once that barrier was overcome, Italians would be capable of seeing to their own social welfare. The percentage of illiteracy, he said, was about the same on the Mayflower as it was in Harlem's Little Italy when Cotillo went to law school, but the Pilgrims were illiterate in English.[57] Beyond language, Cotillo appears to have had in mind, as relevant to Italian-American politics, the long and bitter history of the peasant village in Southern Italy and the fact that the political power of the village and of its old way, *la via vecchia*, in the extended family was its ability to draw in to itself and survive — literally and culturally — the corrupting force of powerful outsiders.

Cotillo did not emphasize being American. He emphasized voting: "Become citizens," Cotillo said, "You will then have the right to take part in the government. This is a system of self-government. You Italians, more than others, should understand this. For so long as you leave it to others you will be oppressed by these others," he said, "the longer you remain inarticulate

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aly. Mr. Rava was a lawyer and law teacher in Venice; he qualified for the bar there in 1936. In this country he found his experience and expertise "not saleable" and enrolled in Washington University Law School under a World War II program sponsored by the American Bar Association. It may be indicative of his immigrant roots that much of his practice since he was admitted in Missouri in 1942 has been in immigration law. *Judges and Lawyers: First Generation Success Stories*, THE JUDGES J. 5, 9 (1986).

[56] *See* COURTS, *supra* note 33, at 47-48.

[57] *See* N. FERBER, *supra* note 27, at 27.

and inactive, by so much longer will you be looked upon as not merely alien in blood and temperament, but in thought and moral philosophy. You will be looked upon as outlaws. Do not delay, for the longer you are held in low esteem, so much the longer will it require to establish yourself as worthy citizens in the eyes of those who today look down on you."[58]

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Covello's study of Italian-American school children argued, as Marino had, that the confusion of being in the first generation born in America led to moral breakdown: "Weakened social controls within the family and the local community have contributed to the development of attitudes ranging from disobedience to defiance of all adult authority," Covello said. "The decline of family authority has engendered, on the part of the younger generation, a feeling of superiority to parents who are poor, socially handicapped in language, manners, or dress, and who are therefore considered alien to a complex social environment. The younger Italo-American is often ashamed of his parents."[59]

Helen Barolini's literary and biographical evidence supports Covello's perception of cultural confusion, but neither those sources of insight, nor the implications of Cotillo's law practice in Little Italy, supports the argument Covello and Mariano make that there was a breakdown in respect for parental authority. For one thing, neither Covello nor Mariano distinguishes between defiance parents approved of and even encouraged — truancy for example, in Covello's account — and defiance of the values of *la via vecchia.* Both leave out of account the belief among Italian-Americans that education deeply conceived — as moral formation — was the province of the family, not of the government. Neither gives sufficient respect to *l'ordine della famiglia* as having the cultural survival value in America that it had in Southern Italy. Both make the assimilator's mistake: They want the vulnerable culture to conform without being valued. They want to settle for individual rights.

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[58] *Id.*; *see also* T. Henderson, *supra* note 27.

[59] *See supra* note 52, at 416.

Fran Claro's mother yearned to separate herself from her immigrant parents, but she did not; her father was there to take his granddaughter to the *festa* parade. She yearned as well to renounce homespun Italian entertainment, but she did not; her defiance amounted to finding a corner where she could read *Rebecca* and rebel quietly.[60] The distinction is subtle but important, because continuing connections with Italian culture in Fran Claro's mother's generation (as in the first, second, and third American-born generations in *Umbertina*) is what made it possible in the next generation, and the one after it, for Italian-Americans to begin to learn to appreciate and acknowledge their heritage. Modern Italian-Americans owe that opportunity to the fact that their grandparents ignored Mariano's argument and listened to Cotillo's.

IV. EARLY ITALIAN-AMERICAN LAWYERS

There were Italian-American lawyers in the generation that grew up in the 1920s. Mariano says they were frequently scoundrels. The Italian-American lawyer who was honest and apparently not well assimilated had no experience beyond the workmen's compensation system, minor courts in the civil system, and criminal law.[61] In his 1925 book, Mariano counted three hundred Italian-American law students in New York City and estimated that ten years earlier there had been as few as fifty. The Italian population of New York City was 750,000 when he wrote and there were not "even one thousand lawyers of Italian parentage" in the city.[62]

Whether the American legal system was as benign and nurturing as Mariano said, or as power-driven as Cotillo expected it to be, Italian-American lawyers should have been in a position to mediate between the dominant American culture and the children of the Italian immigrants. Mariano thought Italian distrust of American law got in the way of what Italian-American lawyers were able to do. Italians often let their legal rights go unvindicated "for fear of falling into the hands of unscrupulous attorneys," he said,[63] because "in the past . . . the illiterate were easy prey for their unscrupulous fellow Italians."[64] He does not mention — as other descriptions of this immigrant society often do — the possibility that the Italian-American lawyer, who had gone out from the community to study English common law, in English, with Anglo-Saxon, Protestant Americans, was seen as a threat to *la via vecchia*, and distrusted for that reason — not because he was either simple-minded or a swindler, but because he proposed the corruption of *l'ordine della famiglia*.[65] Fiorello LaGuardia is an example: Many — in some elections more than half — of the Italian-Americans in New York City voted for LaGuardia's opponents. His personal life (he had married a non-Italian, who was not a Catholic) and his political program threatened *la via vecchia*; it did not matter enough that he was an Italian-American. Ethnic loyalty was not what was at stake; the preservation of culture was at stake.[66] The possibilities Mariano neglected were that Americanizers were distrusted and the Italian-Americans in law practice were seen as Americanizers.

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[60] *See supra* note 43.

[61] In contrast, he says, to Jewish lawyers. *See* COURTS, *supra* note 43, at 46.

[62] *Id.* at 63. He counted 900. *Id.* at 44, 63.

Mariano says another reason Southern Italians and their children did not go to Italian-American lawyers was that they did not like to give personal information to anybody they knew, and did not trust professional assurances of confidentiality. He may have been closer to the real reason when he hinted that the immigrants and their children did not believe, as Mariano did, that the Italian-speaking lawyer was "a power for untold good among his people . . . the one person who by training and by experience is best fitted to interpret his people to others . . . their best *public* interpreter."[67] The suggestion we construct here is that an Italian-American lawyer had to demonstrate that he was not an assimilator. He had the burden of proof, and he sometimes failed to meet it to the satisfaction of the wary Southern Italians Mariano wanted him to assimilate.

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[63] *Id.* at 39, 53.

[64] *Id.* at 45.

[65] *E.g.* J. BARTON, PEASANTS AND STRANGERS: ITALIANS, RUMANIANS, AND SLOVAKS IN AN AMERICAN CITY, 1890-1950 (1950) at 156-58.

[66] R. GAMBINO, BLOOD OF MY BLOOD: THE DILEMMA OF THE ITALIAN AMERICANS 297 (1974).

[67] *See* COURTS, *supra* note 33, at 50.

Mariano had hope for the future, hope for Italian-American lawyers as they became more numerous and experienced. But the hope he had was for an assimilated Italian citizenry — assimilated in significant part by the efforts of Italian-American lawyers. These lawyers would themselves come from assimilated Italian families, he said, "along the same lines as . . . among the members of other racial groups . . . who are older here in point of time."[68] These lawyers would teach their Italian neighbor that "the laws of this land are made for his good . . . and that there is usually sound reason for many of the laws and prohibitions that face the bewildered newcomer."[69] He said the task of the Italian-American lawyer was the task "of Americanizing the Italian," teaching him to esteem the stars and stripes rather than "the Flag of the House of Savoy."[70] This change in flags would give Italian-Americans an understanding of spiritual and economic opportunity in America, and a common language, Mariano said, developing among Italians "American nationalism in times of peace as well as in times of war . . . patriotism and loyalty to American tradition . . . the elimination of race hatreds . . . an American standard of living . . . [and] the full and free emancipation of the Italian women."[71]

V. COTILLO AS A PRESERVER

Salvatore A. Cotillo's life as a young lawyer in Harlem's Little Italy was more clearly an Italian experience than the life of the Americanized Italian lawyer as Mariano visualized it, although in some ways what Cotillo did for his Italian clients was what a lawyer would have done for them in his native Naples. He was a legal counselor in his neighborhood,[72] but he was also, in those years, attorney for the Bank of Naples and Consul General in New York City for the government of Italy. During World War I, when he was within the first five years of his practice, he lived in Italy and there represented the American Bureau of Public Information.[73]

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[68] *Id.* at 49.

[69] *Id.* at 55.

[70] *Id.* at 73. As if a Southern Italian would have had esteem for the flag of the House of Savoy!

[71] *See* COURTS *supra* note 33, at 73-74. V. D'Andrea, *The Social Role Identity of Italian-American Women: An Analysis and Comparison of Familial and Religious Expectations*," in THE FAMILY AND COMMUNITY LIFE OF ITALIAN AMERICANS 61 (R. JULIANI ed. 1983), argues that the immigrant Italian married woman was better off, economically and spiritually, under *l'ordine della famiglia* than her counterparts in families in the dominant American and Irish-American cultures were.

Cotillo also exhibited the professional rectitude Mariano hoped for in the new generation of American-born, Italian-American lawyers. For example there were unscrupulous Italians in Cotillo's neighborhood — notably bankers, steamship-ticket sellers, and thugs. One Giosue Gallucci met American law with bribery and violence. He boasted that he could "fix" things with the police and gain advantage through force and intimidation where Cotillo sought advantage, then and later, through compromise and political competence.[74]

> Gallucci boasted that murder could be bought and paid for. Stories were circulated that he caused witnesses to disappear, that an unwanted wife could be loaded upon a boat, given some money, and shanghaied back to "the old country." Gallucci was arrested for carrying concealed weapons, and Cotillo was asked to testify on his behalf as a character witness. He refused, making palpable the breach between himself and the district's underworld. After Cotillo was admitted to the Bar, he refused, despite the tender of attractive fees, to help men of Gallucci's character secure pistol permits and the break flared into open hostility.

Gallucci was later killed by another gangster (which is no more a vindication of American law than it is of Gallucci's way of dealing with American law).

Cotillo dealt with employment and family situations, with the same swindlers and the same bias and weakness in the law.[75] He functioned as listener and guide in a way that was more like the lives of nineteenth-century American "republican" lawyers than the lives of lawyers in Southern Italy:[76]

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[72] *See* N. FERBER *supra* note 27, at 19.

[73] Cotillo's book about Italy, *supra* note 27, was based on his experiences during those war years in Italy.

[74] *See* FERBER, *supra* note 27, at 20.

[75] *Id.* at 21.

> Coming home at night Cotillo often found groups of young people on the front stoop. They had gathered for what they knew would prove an interesting and inspiring talk. Before he went in for dinner, Sal spoke to them. There were discussions about every conceivable topic, but dominating everything that Cotillo had to say was his conviction that the new Italian element in American life ought to command an important role in the process and drama of government. This role, he told his listeners, could begin in their own neighborhood.

Ferber's biography of Cotillo also describes in Cotillo's early law practice a lot of uncompensated charity for neighbors. But it is evident in Ferber's description that Cotillo was building alliances, from his earliest days as a lawyer, that would make it possible for him to use un-Americanized, Italian-voter power as his Irish elders in New York and Boston were using the power of other immigrant groups.

Cotillo's opinion of American jurisprudence was far different from Mariano's. He saw that American law was flawed, and particularly so as it was imposed on immigrants and their children. His early career went well beyond what Mariano described. He used political means to preserve Italian culture where Mariano would have used professional influence to turn the immigrants into melting-pot Americans. He went from his law practice to be the first Italian-American assemblyman, thence to become the first Italian-American senator, in the New York legislature — and in both houses his principal activity was the development and passage of social-welfare legislation. He was later the first Italian-American appointed to the Supreme Court (trial) bench in New York. Governor Smith said Cotillo served as a judge with "mellowness of spirit" and "the same interest and activity which influenced his early work in the Legislature."[77]

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[76] *Id. See* R. Caporale, The Value System of Southern Italian-American Professionals: A Comparative Profile, in Italian Americans in the Professions 275 (R. Pane ed. 1983).

[77] *See* N. Ferber, *supra* note 27, at vii.

Cotillo's biographer, who, I think, missed the point, celebrated Cotillo's judicial qualities with a quotation from Shakespeare. He might better have used Dante — or even Machiavelli: Cotillo's position within Little Italy was an Italian position, most particularly in his insistence that Italians in America would not be able to take advantage of American opportunity unless they did so with political power, and in his courageous resistance to the darker elements in Little Italy's culture. An example on both points involves his early encounter, as a beginning lawyer, with another gangster:[78]

> He was retained to defend a man involved in a sex crime. The next day he was waited upon by the local Camorra leader — son of a Camorraist notorious in the old country. This fellow blandly announced that he would arrange Counsellor Cotillo's fee in the case; that henceforth all defense arrangements for persons arrested for crime would be handled by the Camorra leader or his lieutenants, and that the young attorney must govern his conduct and regulate his fees by his dictation. By way of mitigating his effrontery, the Camorraist assured Cotillo that if he fell in with this plan, his speedy financial independence was assured; but that, on the other hand, if he did not, great harm would come not only to him but to his family as well. In response, Cotillo, young, idealistic and with his recent quaffing at the cup of legal ethics pounding righteously in his bosom, rose to daring and dramatic heights. He replied that his law practice was his own; that he would look for guidance only to the courts and the tenets of the Bar Association; that the Camorra might know once and for all that he did not intend to be coerced or intimated. He ordered the man from his office.
> The enraged Camorraist lifted his cane and this struck Sal as funny. Though the moment had been tense, he smiled. The mobster was puzzled by the smile. It unnerved him. He hesitated. Men threatened by him did not smile. In that fleeting moment Cotillo recalled that a useless antique gun lay in his desk. It had been given him as a harmless toy . . . by his grandfather. Cotillo reached into a drawer, withdrew the pistol and leveled it at the bandit . . . . The terror-dealing Camorraist lost his nerve . . . shrieked in fear . . . Cotillo booted him

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[78] *Id.* at 23-24.

> out of his office . . . .
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> News of how young Catillo had dealt with the much-feared "bad man" spread rapidly among the Italians of the city. The better element, enormously in the majority, applauded his courage. He became their champion; and was from that day feared and avoided by the underworld.

VI. Conclusion

The significant contrast between the Italian-American lawyer Mariano envisionsed and hoped for, and the Italian-American lawyer Cotillo typified, is an earthy appreciation for the uses of power. It is, as the biographer says, ethics — but the ethics has more of Italy in it than of the vaporous and contemporary rhetoric of the Bar Association of the City of New York. The antique pistol Cotillo kept in his law office was not, after all, a toy; it was the effective device of a wily, resourceful young lawyer, who — as is often the case with lawyers — found out how to use power he did not have.

Cotillo knew that American legal institutions were *not* excellent and that native Italian disgust for hypocrisy would make it impossible for Italians to trust them. But, whether the institutions remained as they were or became — not excellent, but useful — the key to justice for Italians was to use these institutions and with them gain political power.[79] Cotillo was a co-founder, with his father, of an Italian-American political club called the Tomahawk Democratic Club. The Cotillos and their club took on the Hayes Machine in 1911. The club got beat in the electoral contest, but Cotillo made a deal with Hayes that gave Little Italy a political foothold in the city.[80] The Italian community later brought as much pressure as it had to bear on Hayes, and Hayes and his machine put Cotillo in the legislature.

"I want to help my people," Salvatore A. Cotillo said, "and can do so only with the backing of those in power."[81] It is indicative of the arguments Cotillo made when he spoke in Little Italy that he, alone among the speakers who attacked Hayes in 1911, was left alone by Hayes's goons. He was as bold with his voice and (very local) influence as he had been with his grandfather's antique pistol:[82]

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[79] T. Henderson, *supra* note 27, describes this political activity and relates it to later developments in Italian-American influence in American politics. Justice Cotillo remained interested in Democratic politics until his death in 1939.

[80] *Id.* at 84.

[81] *See* N. Ferber, *supra* note 28-29.

> [I]t was on the stump that [the club] encountered all their difficulties. For no sooner did they mount the tailboard of a truck at some street corner than they were stoned and thrown off. The only one immune from such treatment was the popular young Cotillo. Throwing stones or offering violence to one of their own — an Italian — particularly this popular son of a popular father, was taboo. Even the fiery Hayes took heed of this viewpoint of his Italian constituents and ordered that young Cotillo should not be molested when making a speech, regardless how bitter his attack, even on Hayes himself. Cotillo thus became the lone champion of his group, fighting single-handed against an array of Tammany orators long schooled in their work.

Italian culture in America has survived longer than Mariano thought it would. It has survived long enough to be valued by the dominant culture, even to be learned from. We think it will probably survive as a permanent influence on the practice of law in America, as well as on American politics. There is evidence of influence in the daily newspapers: one of the country's most prominent and popular governors;[83] its first female candidate for national office;[84] many judges, mayors, legislators, and presidential advisors;[85] and the first Italian-American on the bench of the United States Supreme Court[86] — all of these national leaders are lawyers and all are visible and openly within their Italian culture. They are Italian Americans. In some ways, they are, as their immigrant ancestors were, Italians in America. Their argument — and ours — is that being Italian in America is a good thing for them, for other Italian Americans, and for the country. They have something worth preserving.[87]

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[82] *Id.*

[83] DIARIES OF MARIO M. CUOMO: THE CAMPAIGN FOR GOVERNOR (1984); *see* H. Boyte, *The Politics of Community*, THE NATION, Jan. 12, 1985, p. 12.

[84] *The Making of a Trailblazer*, People, July 30, 1984, p. 24; A. Hughes and F. LaVeness, *Congresswoman Geraldine A. Ferraro: An American Legacy*, in A. LAVENESS AND J. SWEENEY, WOMEN LEADERS IN CONTEMPORARY U.S. POLITICS 35 (1987); G. FERRARO, MY STORY (1985); *see* W. Schneider, *The New Shape of American Politics*, The Atlantic Monthly, January, 1987, p. 39.

[85] S. Hall, *Italian-Americans: Coming Into Their Own*, The New York Times Magazine, May 15, 1983, p. 28; A. Parker, *Not Only a Great Man, But a Decent Man*, Trial, February 1986, p. 11 (on Peter W. Rodino, Jr.); S. LaGumina, *John Pastore, Italian-American Political Pioneer*, and J. Paolini, Jr., *An American Italian: The Life and Times of Luigi DePasquale (1892-1958)*, both in THE MELTING POT AND BEYOND: ITALIAN AMERICANS IN THE YEAR 2000 1, 15 (J. Krase & W. Egelman eds. 1987); R. Angell, *The Sporting Scene*, The New Yorker, Aug. 22, 1988, p. 50 (on A. Bartlett Giamatti, the

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Commissioner of Baseball); J. BRIGGS, AN ITALIAN PASSAGE: IMMIGRANTS TO THREE AMERICAN CITIES 1890-1930 169-70 (1978) (on lawyers); G. QUILICI, THE ITALIAN AMERICAN LAWYERS OF CHICAGO (1968).

[86] *The Supreme Court with a Smile*, U.S. News and World Report, Jan. 12, 1987, p. 23; *New Kid on the Block*, A.B.A. Journal Aug. 1, 1986, p. 20; S. Adler, *Live Wire on the Circuit*, The American Lawyer, March, 1985, p. 86; R. Nagareda, *The Appellate Jurisprudence of Justice Antonin Scalia*, 54 U. CHI. L. REV. (1987).

[87] We are grateful for the assistance of Linda Harrington, Kenneth Kinslow, Peter Noone, Robert S. Redmount, Nancy J. Shaffer, and Michael J. Slinger.

THE APPELLATE LAWYER'S ROLE IN THE CASELOAD CRISIS

*Michael Vitiello**

The topics of caseload and case management now dominate discussion about federal courts.[1] Indeed, many recent Supreme Court decisions reflect the Court's concern with an overcrowded docket.[2] As a result, the Supreme Court[3] and many commentators[4] have looked favorably on alternative dispute resolution proposals as a means of lightening the caseload.

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[1] *See generally* P. CARRINGTON, D. MEADOR, & M. ROSENBERG, JUSTICE ON APPEAL, 1-11, 121-230 (1976)(general discussion of problems in appeals process resulting from increased caseload); Resnick, *Precluding Appeals*, 70 CORNELL L. REV. 603, 603-25 (1985)(discussion of effect of heavy caseload on doctrine limiting access to adjudication); Resnick, *Managerial Judges*, 96 HARV. L. REV. 374, 474-448 (1982)(general discussion of evolving judicial role as response to caseload difficulties); Hoffman, *The Bureaucratic Spectra: Newest Challenge to the Courts*, 66 JUDICATURE 60, 60-72 (1982)(discussion of judge's administrative responsibilities).

[2] *See, e.g.*, Walters v. National Assoc. of Radiation Survivors, 473 U.S. 305, 334-35 (1985)(upholding statute limiting attorneys' fees to $10.00 in cases before Veteran's Administration); Marek v. Chesnyk, 473 U.S. 1, 11-12 (1985)(applying FED. R. CIV. P. 68 to attorneys' fees under 42 U.S.C. § 1988, thereby increasing incentive to settle civil rights cases).

[3] *See, e.g.*, Shearson/American Express, Inc. v. McMahon, 107 S. Ct. 2332, 2344-46 (1987)(holding "RICO" statute not punitive in nature, therefore, civil RICO claim not precluded from resolution by arbitration); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 850, 587-58 (1986)(upholding constitutionality of agency proceedings, emphasizing interest in inexpensive, expeditious alternative to litigation); Thomas v. Union Carbide Agricultural Products, 473 U.S. 568, 593-94 (1985)(upholding as constitutional statute requiring binding arbitration in cases arising under FIFRA).

[4] *See generally*, Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253-277 (1985)(purposes use of case management techniques encouraging alternative dispute resolution); Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643-59 (1985)(general discussion of caseload crisis on quality of litigation process).

Moreover, many federal judges have added their voices to the debate over the so-called "caseload crisis" and the various remedies proposed.[5] To be sure, the caseload affects these judges most directly; it determines both the pace of their work and their perception of the job itself. Many of them lament the passing of an era as recent as twenty years ago when federal courts of appeals were collegial places where appellate judges had ample time to deliberate on the cases before them.[6] Moreover, it can probably be said without dissent that the overloaded federal court system also creates serious problems for litigants, lawyers and the courts. A heavy caseload can slow the decision making process to an unacceptable level, and yet efforts to keep pace to avoid delayed justice may produce unjust results. For instance, hasty deliberation may produce inconsistent decisions within a federal circuit, while this same caseload pressure reduces *en banc* review, preventing correction of those inconsistent decisions.[7]

However, proposed solutions to this caseload problem are fraught with difficulties. For example, creating new judgeships would have definite disadvantages, even if that course were politically and economically feasible.[8] Furthermore, although liberal Warren Court doctrine unquestionably contributed to the dramatic increase in the volume of litigation in the 1960s,[9] the volume of federal litigation nonetheless has continued to increase throughout the 1970s and 1980s even as the Burger and Rehnquist courts have eroded those same liberal precedents.[10] Congress also is responsible for a large part of the increased caseload because over the years it created a host of new federal rights without regard to the impact on the judiciary.[11] Thus, it is difficult to even isolate the cause or causes of the burgeoning federal docket.

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[5] AM. J. TRIAL ADVOC., 63, 63-80 (1981)(discussion of mechanics of appellate process); Rubin, *Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency*, 55 N.D. LAWYER, 648, 648-59 (1980)(general discussion of caseload increase in federal courts); Higginbotham, *Bureaucracy — The Carcinoma of the Federal Judiciary*, 31 ALA. L. REV. 261, 261-72 (1980)(general discussion of problems caused by heavy caseload). *See also, Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 21-23 (prepared statement of Chief Judge James P. Coleman, U.S. Court of Appeals, Fifth Circuit).

[6] *See, e.g.*, Rubin, *supra* note 5, at 648 (noting that author once felt federal judges were "magisterial if not regal").

[7] *See infra* notes 37-43 and accompanying text.

[8] *See, e.g.*, *Proceedings of the Forty-Seventh Annual Judicial Conference of the District of Columbia Circuit*, 114 F.R.D. 419, 546-48 (1986) [hereinafter *Proceedings*] (comments of Ms. Knab, suggesting that large federal deficit makes new judgeships improbable). Apart from the deficit, one must recognize that as long as the Democratic Party controls Congress and a Republican is President, Congress may not be motivated to afford the President the opportunity to annoint a large number of lifetime appointees.

[9] *See* Howard, *Our Litigious Society*, 38 S.C. L. REV. 365, 369-70 (1987)(Warren

In any event, prominent commentators have reacted to the perceived crisis and advocated significant curtailment of federal court jurisdiction. For example, Chief Justice Rehnquist has advocated abolition of the appeal of right to the federal courts of appeals.[12] Other observers have suggested elimination of federal court jurisdiction altogether in specific classes of cases.[13] To be sure, some of the suggested remedies are politically neutral; for example, when a commentator suggests elimination of diversity jurisdiction, one does not suspect a hidden political agenda.[14]

Court activism helped create litigation explosion). Examples of Warren Court cases which increased litigation in federal court are numerous. *See, e.g.*, Malloy v. Hogan, 378 U.S., 1, 8-9 (1964)(applying fifth amendment's privilege against self-incrimination to states through fourteenth amendment); Fay v. Noia, 372 U.S. 391 *passim* (1963)(expanding general range of cases cognizable in habeas corpus proceedings); Mapp v. Ohio, 367 U.S. 643, 654-55 (1961)(applying fourth amendment's exclusionary rule to states through fourteenth amendment).

[10] *See, e.g.*, United States v. Frady, 456 U.S. 152, 167-69 (1982)(applying strict cause and prejudice standards to procedural default by federal prisoner in § 2255 proceeding); Sumner v. Mata, 449 U.S. 539, 547-49 (1981)(strengthening presumption of correctness given to state court fact finding in habeas proceedings); Wainwright v. Sykes, 433 U.S. 72, 87-90 (1977)(enforcing strict procedural default standard in § 2254 proceedings); Stone v. Powell, 428 U.S. 465, 492-94 (1976)(holding state prisoner's claimed fourth amendment violation beyond review in habeas proceeding where prisoner had full and fair opportunity to litigate question in state court). Professor Howard suggests that the Burger Court has opened up new areas of litigation. Howard, *supra* note 9, at 370.

[11] Rubin, *supra* note 5 at 657-58. *See* Howard, *supra* note 9, at 370 (cites various rights expanded by Burger Court including abortion and commercial speech).

[12] Address by Justice William Rehnquist at the 75th Anniversary of the University of Florida College of Law and the Dedication of Bruton-Greer Hall (Sept. 15, 1984).

[13] *See* Rubin, *supra* note 5, at 658 (suggested elimination of federal diversity jurisdiction).

[14] *Id. See also*, C. WRIGHT, LAW OF FEDERAL COURTS, § 23, at 127-37 (4th ed. 1983) (discussing arguments for and against general diversity jurisdiction). *Id.* at 164 (discussing change in reputation of federal courts as pro-business); Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 334 (1977) (56% of lower federal judges favored elimination of diversity jurisdiction).

However, such neutrality is not the case when, for example, Judge Richard Posner calls for judicial restraint and for renunciation of habeas corpus jurisdiction as he does in his provocative book, *The Federal Courts: Crisis and Reform.*[15] Hence, this article attempts to discuss and evaluate the merits of these diverse approaches to the caseload problem. In the end, however, I assert that courts and commentators should focus their attention on the lawyers who argue in the appellate courts. Indeed, only when the deficiencies and laxness of many appellate lawyers are identified and addressed will there be any real hope of significant improvement in the federal appeals dockets.

This article operates on the premise that access to the federal courts is one of the finest traditions in our governmental system. Unquestionably, Article III courts have been instrumental in securing individual rights.[16] Thus, even if flawed, the independent federal judiciary works well.[17] So too does the appellate process where oral argument gives litigants direct access to the decision makers and where written opinions compel the decision makers to justify their decisions.[18] Because of the value of this open access to federal courts, curtailment of jurisdiction or the elimination of the right of appeal ought to be a remedy of last resort.

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[15] R. POSNER, THE FEDERAL COURTS: CRISES AND REFORM 186-88, 220-22 (1985).

[16] *See, e.g.*, Plyer v. Doe, 457 U.S. 202, 230 (1982) (upholding illegal alien's right to public education); Roe v. Wade, 410 U.S. 113, 152-54, 166 (1973) (upholding woman's right to privacy, encompassing right to terminate pregnancy); Boddie v. Connecticut, 401 U.S. 371, 382-83 (1971) (establishing indigent's right to free access to state court to procure a divorce); Stanley v. Georgia, 394 U.S. 557, 568 (1969) (upholding individual's right to possess obscene material in his home); Loving v. Virginia, 338 U.S. 1, 12 (1967) (holding Virginia anti-miscegenation law unconstitutional); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (guaranteeing married couple's right to privacy); Brown v. Board of Education, 349 U.S. 294, 300 (1955) *enforcing* 347 U.S. 483, 493-94 (1954) (holding segregated schools violative of equal protection).

[17] Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581, 581 (1985). Article III's guarantee of life tenure and protection against diminished compensation may not guarantee independent decision making by all federal judges. Such a system affords greater incentive for independent judgment than does a system where judges must run for re-election. *Id.* For discussion of some specific instances where federal judges have enforced decisions in the face of public outrage, *see* P. COOPER, HARD JUDICIAL CHOICES 12 (1988) *passim* (discussion of numerous cases decided contrary to public opinion). *See also* Resnik, *supra*, at 581 n. 1 (comparing "extraordinary luxuries" in Article III with political pressure brought to bear against former California Chief Justice Bird).

[18] R. ALDISERT, THE JUDICIAL PROCESS § 1 at 14 (1976). As any reader is aware, law professors and other legal writers subject judicial decisions to agonizing and critical scrutiny, and some judges have viewed traditional scholarship as helpful in their job. *See,*

In this article, I examine some of the effects of the increased caseload on the federal appellate courts.[19] I then examine both Chief Justice Rehnquist's and Judge Posner's proposals to limit access to the federal courts. In the end, I conclude that both proposals are inappropriate.[20] Instead, I suggest that rather than impairing a system which reflects important values, we ought to examine ways in which better advocacy can improve the appellate process.[21]

I. The Collegial Judiciary

A number of commentators have decried the transformation of the federal judiciary in the past twenty years.[22] Specifically, they bemoan the way in which the appeals courts have proliferated in response to the enormous increase in the appellate caseload. In their view, this development has transformed the role of the appellate judge "[f]rom collegial arbiter and solitary craftsman" to "the equivalent of the managing partner of a small law firm."[23] This new role for the judge raises concerns about the adequacy of the court's decision making capacity.

The collegial federal judiciary is often identified with the work of the Second Circuit during Judge Learned Hand's celebrated tenure on that court. As described by Judge Alvin Rubin, "Circuit judges [in those days] . . . sat in stately triumvirates and, after listening to the oratory of argument, retired to their

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e.g., Richardson, *Law Reviews and the Courts*, 5 Whittier L. Rev. 385, 389-90 (1983)(discussion of role of law students and faculty in shaping the direction of jurisprudence); B. Cardozo, Introduction to Selected Readings on the Law of Contracts at vii, ix (1931).

[19] *See infra* notes 22-43 and accompanying text.

[20] *See infra* notes 44-236 and accompanying text.

[21] *See infra* notes 237-88 and accompanying text.

[22] *See, e.g.*, P. Carrington, D. Meador & M. Rosenburg, *supra* note 1, at 4-12 (explaining that performance in American appellate systems is threatened by increase in workload); *see generally*, Hoffman, *supra* note 1 (arguing that increase of workload is converting judiciary into bureaucracy); Rubin, *supra* note 5 (discussing effect of increased work load on court system).

[23] Hoffman, *supra* note 1, at 63.

chambers where, in coat and vest, they studied law books and whence they issued opinions in phrases redolent, if not equal to, those of Learned Hand and Benjamin Cardozo."[24]

Perhaps still a reality within the First Circuit,[25] the ideal model of the appellate court involved "intimacy, continuity and dynamism in relations among judges . . . ."[26] Simply stated, a small number of judges within the same courthouse were able to "interact with each other, influence each other, and have each other in mind almost from the time they first read briefs for the next session of court."[27]

However, the dramatic increase in the appellate workload between 1940 and the present has changed the way appellate judges perceive their jobs.[28] While the number of judgeships has proliferated, judges have still not kept abreast with the caseload.[29] Thus, judges today must decide more cases than their predecessors. Furthermore, contemporary adjudication is far more complex than in the past and requires more time for adequate deliberation.[30] Unfortunately, all of these factors dilute collegial decision making. For example, the Ninth Circuit has twenty-eight circuit judges.[31] The circuit covers nine states and thousands of miles.[32] Thus, size makes collegiality impossible because one judge among twenty-eight will sit infrequently with another judge. Similarly, especially where a circuit includes judges appointed by presidents with philosophies as diverse as John Kennedy and Ronald Reagan, conflicts within the circuit are inevitable,[33] but "[a]s the need for *en banc* review grows, . . . the ability of the enlarged courts to harmonize opinions falls inversely."[34]

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[24] Rubin, *supra* note 5, at 648; *see also* SCHICK, LEARNED HAND'S COURT (1970) (studying federal courts of appeal and recognizing that most of their work goes unappreciated); Kurland, *Jerome N. Frank: Some Reflections and Recollections of a Law Clerk*, 24 U. CHI. L. REV. 661, 665 (1957)(introduction to subsequent article by late Judge Frank discussing Second Circuit Court of Appeals when Judge Learned Hand was senior member and Judge Frank was junior member).

[25] The First Circuit has only six circuit judges. 840 F.2d viii. For a personal account of the work style of one of those judges, *see* Coffin, THE WAYS OF A JUDGE (1980).

[26] Coffin, *supra* note 25, at 58.

[27] *Id.*

[28] *See, e.g.*, Rubin, *supra* note 5, at 657. (desirability of being federal judge is inversely proportionate to number of routine cases brought to federal court). Circuit Judge (then District Judge) Higginbotham has argued that the quality of federal judges is diminished by the increased caseload and by the trivial nature of some disputes now within federal court jurisdiction. Higginbotham, *supra* note 5, at 261-72; *see also* H. FRIENDLY, FEDERAL JURISDICTION 28-30 (1973)(providing general view of federal jurisdiction); King, *The Unmaking of a Bankruptcy Court: Aftermath of Northern Pipeline v. Marathon*, 40 WASH. & LEE L. REV. 99, 120 (1983)(discussing effect of *Northern Pipeline* which held that 28 U.S.C. § 1471 was unconstitutional because it authorized overbroad jurisdiction in allowing bankruptcy courts to adjudicate all matters related to cases arising under Title 11 of the Bankruptcy Code).

[29] Hoffman, *supra* note 1, at 63; Rubin, *supra* note 5, at 650-51.

[30] Hoffman, *supra* note 1, at 63; Rubin, *supra* note 5, at 649.

Although difficult to quantify, the caseload pressure and resultant time constraints and loss of congeniality affect the quality of the judiciary's work product. As argued by Judge Rubin, ". . . courts . . . are unable to cope with the torrent of cases without resorting to measures adopted primarily as time savers."[35] Such measures include abandoning oral argument and a formal written opinion in many cases.[36] Consequently, as "[m]ore conflicting opinions are rendered, the law becomes less predictable and less effective as a guide to behavior."[37]

Judges admit that much of the work of judging must be delegated to law clerks. To handle the volume of work, judges are sharing the task of actual decision making with their clerks. Current law clerks, "among the brightest and ablest graduates of our law schools, are not merely shelving books and running citations in Shepard's. They are in many situations parajudges."[38]

Eventually, transferring too much responsibility to recent law school graduates results in less informed decisions.[39] Indeed law clerks have less practical experience than judges, and thus, their decisions may be more logical than wise. Greater delegation of responsibility to law clerks also undermines the public perception that judges judge. It erodes the constitutional scheme whereby the President, with advice and consent of the Senate, appoints independent Article III judges to decide cases.[40]

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[31] Wasby, *Technology and Communication in a Federal Court: The Ninth Circuit*, 28 Santa Clara L. Rev. 1, 3 (1988).

[32] Hoffman, *supra* note 1, at 62.

[33] For example, Judge James Browning was appointed on September 18, 1961 by President Kennedy; Judge Edward Leavy was appointed on March 2, 1987 by President Reagan. 840 F.2d at 23.

[34] Hoffman, *supra* note 1, at 62.

[35] Rubin, *supra* note 5, at 650.

[36] *Id.*; *see also* Hoffman, *supra* note 1, at 64 (finding that as workload of courts grow, procedural streamlining has increased and court processes have grown more formalized); Clerk's Annual Report, Judicial Workload Statistics, United States Court of Appeals for the Fifth Circuit (July 1986-June 1987 at i (providing official statistics).

[37] *Id.*

[38] *Id.* at 653.

[39] *Id.*

In short, the caseload has transformed the federal appellate judge from a reflective decision maker to a bureaucrat.[41] Quality suffers because the judge must delegate responsibility.[42] Some commentators have suggested that quality also suffers because, as the job becomes increasingly bureaucratic, it attracts less qualified candidates.[43] In addition, the caseload pressure itself impairs the quality of a court's work. Almost without exception, federal judges admit the strain brought on by the caseload. A problem exists. Conceding that, I am dubious about some of the proposed remedies to the problem.

II. Denial of Appeal of Right

Chief Justice Rehnquist,[44] among others,[45] has suggested elimination of the appeal of right to a federal court of appeals, a right in place in this country for almost a hundred years.[46] Such a proposal raises serious questions. First, while the Chief Justice has asserted that "we have an obsessive concern that the result reached in a particular case be the right one,"[47] characterizing the concern as obsessive as a smoke screen. An appellate system designed to reduce the risk of arbitrary decisionmaking is a goal worthy of support. As an ideal, appellate adjudication gives the trial court incentive to uphold ideals of fairness and equality. Reversal on appeal may not be a severe sanction, but the possibility of review unquestionably gives a trial judge incentive to conform his conduct with the law. In essence, trial judges are more reflective because appellate review is possible.[48]

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[40] *Id.* at 655.

[41] Hoffman, *supra* note 1, at 62-63.

[42] Rubin, *supra* note 5, at 652-53; Wasby, *supra* note 31, at 1.

[43] *See, e.g.*, H. Friendly, *supra* note 28, at 28-30 (asserting that increase in number of judges makes judgeships less prestigious and thus increase in number of judges could result in deterioration of quality of judges); Higginbotham, *supra* note 5, at 271-72 (author fearful of less qualified judiciary).

[44] Rehnquist, *supra* note 12, at 22.

[45] *See, e.g.*, Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 Yale L.J. 62, 107 (1985)(concluding that appeal of right presumptively should be eliminated in view of extent to which it promotes error correction, procedural fairness, and/or process satisfaction); Lay, *A Proposal for Discretionary Review in Federal Courts of Appeal*, 34 Sw. L.J. 1151, 1155 (1981)(finding that in many appeals, only an appearance of justice results due to the large number of cases and suggesting that courts of appeal should be allowed discretionary leave to deny review); Wilner, *Civil Appeals: Are They Useful in the Administration of Justice?*, 56 Geo. L.J. 417, 419 (1968)(generally discussing usefulness of civil appeals in light of increased number of cases).

[46] *See* Carrington, *The Function of the Civil Appeal: A Late Century View*, 38 S.C.L. Rev. 411, 412-17 (1987)(discussing early legislation creating right of appeal).

Second, while some of us may be obsessed with right results, the Chief Justice misleads his audience when he suggests that the appellate courts impose consistent standards of "right" results. Indeed, appellate courts may not have enough power to review results to assure better fact finding. In many instances, results reached below are beyond meaningful appellate review. For instance, while jury decisions have traditionally been subject to limited review, the Supreme Court has restricted the appellate courts' power to review lower court fact finding in discrimination cases.[49] In addition, at least since *Stone v. Powell*,[50] the Supreme Court has steadily eroded the role of federal courts in assuring "right" results in habeas corpus cases.[51] Thus, inconsistent results are inevitable in a wide range of cases where appellate courts must defer to a trial court's decision. One wonders why the Chief Justice is not more concerned about the inequality resulting from limited review. In addition, Chief Justice Rehnquist seems unconcerned that limiting review of facts reduces protection of federal rights.[52]

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[47] Rehnquist, *supra* note 12, at 9.

[48] Carrington, *supra* note 46, at 431; *see generally*, R. Leflar, Internal Operating Procedures of Appellate Courts 4, 9-10 (1976)(explaining that appellate function is to rectify trial court errors but recognizing that hasty decision of appeals provides less assurance that parties will receive justice); P. Carrington, D. Meador, & M. Rosenburg, *supra* note 1, at 2-4 (asserting that quality of appellate decision is threatened by overwhelming caseload).

[49] *See, e.g.*, Pullman-Standard v. Swint, 456 U.S. 273, 285-90 (1982)(holding that court of appeals may only reverse district court's finding of fact on discriminatory intent if it concludes that finding is clearly erroneous).

[50] 428 U.S. 465 (1976).

[51] *See, e.g.*, Teague v. Lane, 109 S. Ct. 1060, 1069-1072 (1989)(overruling *Linkletter* severely limiting retroactive application of new Supreme Court decisions); United States & Frady, 456 U.S. 152, 175 (1982)(prisoner launched collateral attack against conviction due to erroneous jury instruction, which had not been challenged, and court found that prisoner had fallen short of meeting his burden of showing not merely that trial errors created possibility of prejudice, but also that such errors worked to his actual and substantial disadvantage, injecting his entire trial with error of constitutional dimensions); Engle v. Isaac, 456 U.S. 107, 135 (1982)(holding that defendants were banned from asserting their constitutional claim in federal habeas corpus proceedings because constitu-

Third, Chief Justice Rehnquist's proposal to eliminate the right to appeal would "allow [appellate] review only when it is granted in the discretion of a panel of the appellate court."[53] He stops short of urging denial of the right of appeal to all litigants raising certain kinds of claims. Such a proposal would raise serious constitutional questions.[54] In any event, the Chief Justice's proposal is flawed because the panel would have to consider the merits of the litigant's claim to decide whether to exercise its discretion. Indeed, I doubt that the panel's deliberations would be much different from the screening procedures currently in place in some circuits.[55] Within the Fifth Circuit, for example, an increasing number of appeals are decided without oral argument or a published opinion.[56] Unless such a system is administered arbitrarily, the Chief Justice's proposal invites satellite litigation on how the court ought to exercise its discretion.

Finally, making appellate review discretionary raises constitutional problems. Although traditional wisdom suggests that Congress has plenary power over whether to create lower federal

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tional claim was forfeited in state court due to lack of contemporaneous objection to jury instruction); Wainwright v. Sykes, 433 U.S. 72, 91, *reh'g denied*, 434 U.S. 880 (1977)(emphasizing importance of state's contemporaneous objection rule).

[52] For example, Chief Justice Rehnquist wrote the opinion of the Court in *Sykes*, and joined Justice O'Connor's majority opinions in *Frady* and *Isaac*.

[53] Rehnquist, *supra* note 12, at 22.

[54] The extent to which Congress can selectively curtail access to federal courts has been debated heatedly in the scholarly literature. In 1981, various bills were before Congress which would have selectively denied access to specific classes of litigants. Those bills produced extensive hearings in Congress. *See, e.g.*, *Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary on S.158*, 97th Cong., 1st Sess. (1981). For a broad spectrum of views on the constitutionality of selective jurisdiction withdrawal legislation, *see generally*, Long, *Symposium Congressional Limits on Federal Court Jurisdiction*, 27 VILLANOVA L. REV. 893, 895-928, 1030-1041 (1982).

[55] *See* Carrington, *supra* note 46, at 430.

[56] *Proceedings*, *supra* note 8, at 549-50 (comments of Judge Rubin); *see also*, Clerk's Annual Report, *supra* note 36, at i (giving percentages of cases decided by summary disposition).

courts,[57] the drafters of the Constitution also envisioned meaningful appellate review by the Supreme Court. However, the modern caseload makes impossible effective review by the Supreme Court; hence, the original function of the Supreme Court must be shouldered by the courts of appeals.

Professor Eisenberg has developed a similar position.[58] His article challenged the traditional position advanced by Professors Hart and Wechsler that, because lower federal courts were not established by Article III, Congress may abolish their jurisdiction as it sees fit.[59] Eisenberg argues that the drafters of the constitution envisioned a critical function for the judiciary. Of course, its primary role was as a check on the power of co-equal branches within our tripartite system.[60] However, delegates to the Constitutional Convention also envisioned other functions of a national judiciary. Specifically, federal courts "achieve uniformity of decision on questions of national concern . . . [and help] ensure that federal interests take precedence over those of any particular state in matters of federal competence."[61] The judiciary was "intended, perhaps above all else, to be able to hear and do justice in all cases within its jurisdiction," and was conceived of "as [an] instrument for the protection of individuals."[62] Relying on the Federalist papers, Eisenberg argues that "[t]his emphasis . . . strongly suggests that the Framers intended that national tribunals would hear each case within the federal judicial power"[63]

Admittedly, the foregoing analysis, by itself, does not compel the conclusion that appellate review is constitutionally required. One might argue that, even assuming a federal court must be available to a federal right holder, it need not be an appeals court. After all, Congress did not create the courts of appeal for a hundred years.[64]

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[57] *See generally*, M. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power, 21-34 (1980)(discussing Congressional power to ordain and establish lower federal courts).

[58] Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 Yale L.J. 498 (1974).

[59] *Id.* at 501-04.

[60] *Id.* at 505.

[61] *Id.*

[62] *Id.* at 506.

[63] *Id.* at 507.

However, Professor Eisenberg would probably respond by saying that such an argument overlooks the Supreme Court's capacity during that early period of history. As Eisenberg contends " . . . the Founding Fathers felt that the right to appellate review by the Supreme Court would be sufficient to ensure that all litigants with cases within the federal constitutional jurisdiction would have their cases heard by a national tribunal."[65] Delegates to the Convention expected the Supreme Court to check erroneous state court decisions in what were expected to be only a few federal cases.[66] Given these early expectations that federal cases would be infrequent, it was originally thought that the Supreme Court could exercise meaningful appellate review. Because lower federal courts were not mandated, "[t]he federal forum may have been limited to appellate review, but it was to be available in all cases."[67] Thus, under this original view, any litigant with a federal claim would have access to appellate review in a federal appellate court even if the action were originally tried in state court.[68]

The Supreme Court has never had to decide the constitutionality of wholesale withdrawal of federal appellate review, but it seems clear that the Founding Fathers envisioned meaningful review in a federal appellate court. To that end, it must be conceded that courts of appeals are now essential because the modern Supreme Court is no longer able to perform its constitutionally defined role as appellate arbiter of cases arising under federal law.[69]

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[64] Carrington, *supra* note 36, at 414.

[65] Eisenberg, *supra* note 58, at 508.

[66] *Id.* at 508-09.

[67] *Id.* at 509.

[68] *Id.* at 508.

[69] *Id.*

One is tempted to ask how the framers could both intend the federal judiciary to be capable of hearing all cases within its jurisdiction and at the same time not explicitly incorporate inferior federal courts into the constitutional scheme. The answer is that the Founding Fathers felt that the right to appellate review by the Supreme Court would be sufficient to ensure that all litigants with case within the federal constitutional jurisdiction would have their cases heard by a national tribunal. This faith in the availability of Supreme Court review was in evidence at the Constitutional Convention. Rutledge em-

The Supreme Court's legislative courts decisions lend additional support to the argument that Article III judicial review is constitutionally mandated, at least in some circumstances. For over fifty years, often aiming at greater efficiency, Congress has given non-Article III adjudicators jurisdiction over cases within the competence of Article III courts.[70] As the caseload pressure becomes more acute, Congress is likely to experiment further with informal adjudication. Thus, the Supreme Court's legislative court decisions attempt to identify outer limits for such experimentation.

At one extreme, some noted scholars have argued that the Constitution contemplated only Article III courts, making invalid any alternative methods of adjudication within the federal system.[71] As observed by Professor Charles Allan Wright, Article III "would seem to be a very clear declaration that the judicial power . . . can only be conferred on courts where the judges enjoy tenure for good behavior, and assurance against diminution of salary, protections that the Framers, and all succeeding generations, have thought of vital importance in preserving judicial independence."[72]

However, as early as 1829, the Supreme Court began eroding that clear declaration. In *American Insurance Co. v. Canter*,[73] the Court upheld a judgment of a territorial court manned by non-Article III judges. The case involved the validity

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> ployed it as a rationale for not including any lower federal courts in the constitutional scheme. Luther Martin explained in his fellow Marylanders that he did not think that lower federal courts were necessary because, "by giving an appeal to the Supreme Court of the United States, the general government would have a sufficient check over [state] decisions and security for the enforcing of their laws . . . .

Id.

[70] *See* C. Wright, *supra* note 14, at 42 (although Congress created legislative courts early in our history, "[t]he modern expansion of the 'legislative court' concept began in 1923 . . . .").

[71] *See, e.g., id.* at 39-40; Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 Duke L.J. 197, 229 (1983)(discussing effect of *Northern Pipeline* decision which held questioned exercise of jurisdiction of Bankruptcy Courts unconstitutional because their judge lacked Article III's protection of salary and tenure).

[72] C. Wright, *supra* note 14, at 39-40.

[73] 1 Pet. 511, 7 L. Ed. 242 (1829).

of a sale of salvaged cargo, a matter one would have assumed to be within admiralty jurisdiction.[74] The Court held that territorial courts were not "constitutional courts, in which the judicial power conferred by the Constitution on the general government can be deposited. [Territorial courts] are incapable of receiving it."[75] According to the *Canter* Court, Congress created such courts based on power found *outside* Article III (in this instance power over the territories) and that found in the "necessary and proper" clause.[76]

Upon close scrutiny, the Court's legislative courts doctrine, from its beginning in *Canter*, seems incoherent. That the Constitution gives Congress power over the territories proves too much. For example, the Constitution also places power over interstate commerce in Congress,[77] and yet Congress presumably could not create legislative courts to resolve all disputes arising in interstate commerce. In addition, Chief Justice Marshall's assertion that territorial courts are incapable of receiving Article III power also makes no sense.[78] Indeed, the Supreme Court, capable of receiving only matters within Article III judicial power, has repeatedly reviewed decisions by legislative courts like the territorial court in *Canter*.[79] Hence, the matter must be within Article III.[80]

The legislative court concept has a history of inconsistent rationales and results even when the Court has had to decide whether judges on a particular court were Article III judges.[81] To be sure, Supreme Court decisions concerning the topic have ignored the Constitution's express language.[82] However, while the Court has often abandoned its own rationale,[83] it has been consistently pragmatic. Its decisions have almost uniformly upheld Congress' choice of less formal adjudication in spite of Article III's express language.[84] Indeed, from a pragmatic perspective one can only imagine what life would be like in our nation's capital without administrative agencies handling vast numbers of what otherwise look like Article III cases and controversies.[85]

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[74] U.S. Const., art. III, § 2. Elsewhere in *Canter*, Chief Justice Marshall recognized that were such a case tried outside the territories, it would be within the admiralty jurisdiction. *Canter*, 1 Pet. at 545.

[75] *Canter*, 1 Pet. at 546.

[76] *Id.*

[77] For an interesting discussion of that problem, *see* Resnik, *supra* note 17, at 584-92.

[78] *See* C. WRIGHT, *supra* note 14, at 41-42.

[79] *Id.*, citing Durousseau v. United States, 10 U.S. (6 Cranch) 307, 3 L. Ed. 232 (1810).

[80] *See* Glidden Co. v. Zdanok, 370 U.S. 530 (1962)(Justice Harlan's effort to explain apparent contradiction).

[81] *Compare* O'Donoghue v. United Sates, 289 U.S. 516 (1933)(District of Columbia Courts held to be Article III courts) *with* Ex parte Bakelite Corporation, 279 U.S. 438 (1929)(extended *dicta*, District of Columbia courts characterized as legislative courts). On the Court's shifting rationales, see C. WRIGHT, *supra* note 14, at 42-50. Professor

Justice Brennan attempted to give coherence to the doctrine in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[86] the only major decision by the Court denying Congress authority to create legislative courts. However, Brennan's effort failed to secure a majority of the Court and thus resulted in an obviously weakened plurality opinion.[87] At any rate, *Northern Pipeline* struck down the 1978 Bankruptcy Act as a violation of Article III. In doing so, Brennan first grouped many of the Court's earlier decisions into three categories: (1) territorial courts and local District of Columbia courts, where " 'Congress has the entire control . . . for every purpose of government;' "[88] (2) courts martial, like territorial courts, where the Constitution gives "extraordinary control over the precise subject matter at issue;"[89] and (3) public rights cases, a doctrine which "may be explained in part by reference to the traditional principle of sov-

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Wright specifically observes the absence of a "clear analytical answer as to when a court is 'legislative' . . . ." F. Wright, *supra* note 14, at 48.

[82] C. Wright, *supra* note 14, at 39-40; *see also* Resnik, *supra* note 17, at 585.

[83] C. Wright, *supra* note 14, at 42-50. *See also* M. Redish, *supra* note 57, at 40-51; D. Currie, Federal Jurisdiction in a Nutshell 39-44 (1981).

[84] Resnik, *supra* note 17, at 586.

[85] *See* Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 925 (1988)(asserting that regulatory agencies and welfare offices constitute modern "administrative state").

[86] 458 U.S. 50 (1982)(plurality opinion by Brennan, J.)

[87] Justice O'Connor and Rehnquist concurred, but emphasized that they did not decide the broad question answered by the plurality, "whether the assignment by Congress to bankruptcy judges of the jurisdiction granted in 28 U.S.C. § 1471 by § 241(a) of the Bankruptcy Act of 1978 violates art. III of the Constitution." *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 89 (1982).

[88] *Id.* at 65 (quoting Kendall v. United States, 12 U.S. 524, 619 (1838)).

[89] *Northern Pipeline*, 458 U.S. at 66.

ereign immunity,"[90] which allows Congress to "attach conditions to its consent to be sued,"[91] and which does not violate separation of power concerns because public rights cases involve "prerogatives . . . reserved to the political Branches of Government."[92] For all that, Brennan's three categories accounted for only some of the cases in which Congress has created non-Article III adjudicatory bodies. For instance, the plurality recognized the validity of *Crowell v. Benson*[93] and *United States v. Raddatz*.[94] Both of these cases involved fact finding by a non-Article III adjudicator (a compensation commissioner in *Crowell*, and a magistrate in *Raddatz*).[95] However, neither case fits the plurality's three categories in which Congress is given discretion to place the case in a legislative court.[96]

Brennan's plurality opinion described *Crowell*, the classic administrative agency case, and *Raddatz* as cases where the non-Article III adjudicator was merely an adjunct to an Article III court.[97] The plurality characterized the role of those non-Article III adjudicators narrowly. It identified *Crowell* as a case in which Congress created a substantive federal right.[98] According to Brennan, when Congress creates a right, it "possesses substantial discretion to prescribe the manner in which that right may be adjudicated — including the assignment to an adjunct of some functions historically performed by judges"[99] Brennan relied on *Crowell's* argument that juries and special masters fulfill the fact finding function even in Article III courts.[100] However, Brennan emphasized that even where Congress creates adjuncts, it cannot remove " 'the essential attributes' of judicial power"[101] from Article III courts. For that reason, *Northern Pipeline's* plurality underscored that the scheme in *Crowell* was valid because "full authority [was reserved] to the [Article III] court to deal with matters of law."[102]

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[90] *Id.* at 67.

[91] *Id.*

[92] *Id.*

[93] 285 U.S. 22 (1932).

[94] 447 U.S. 667 (1980).

[95] *Northern Pipeline*, 458 U.S. at 78-79.

[96] *Id.* at 77.

[97] *Id.* at 81.

[98] *Id.*

[99] *Id.* at 80.

[100] *Id.* at 78.

[101] *Id.*

Brennan's plurality recognized that Congress had less leeway in entrusting adjuncts with judicial responsibility in cases involving constitutional rights than in those cases involving congressionally created rights, a distinction which was rationalized as a means of maintaining the separation of powers requirements.[103] Congress is within its province in creating substantive rights, but ". . . when the right . . . is not of congressional creation . . . substantial inroads into functions that have traditionally been performed by the Judiciary cannot be characterized merely as incidental extensions of power to define rights that it has created."[104] The plurality emphasized that *Raddatz* upheld the Magistrate Act as constitutional because " '[t]he authority — and the responsibility — to make an informed, final determination . . . remains with the judge.' "[105]

The common denominator in *Crowell* and *Raddatz* is the availability of review by an Article III judge. To be sure, partial shifting of litigation to non-Article III courts is in vogue because it allows less expensive, more expeditious disposition of cases.[106] But, as indicated by Brennan's plurality opinion in *Northern Pipeline*, reliance on an adjunct is constitutional only where an Article III court has review power.[107]

Brennan's tidy distinctions in *Northern Pipeline* failed to command a majority of the Court. Justices Rehnquist and O'Connor concurred, emphasizing that they did not address the broad dispute over "whether the assignment by Congress to bankruptcy judges of the jurisdiction granted in . . . the Bankruptcy Act of 1978 violates Art. III . . . ."[108] Instead, they focused on the state law contract dispute between the parties that would not have been before the Bankruptcy Court but for the fact that the plaintiff had already filed for reorganization under the Bankruptcy Act.[109]

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[102] *Id.* at 81 (quoting *Crowell*, 285 U.S. at 54).

[103] *Northern Pipeline*, 458 U.S. at 81-82.

[104] *Id.* at 84.

[105] *Id.* at 81 (quoting United States v. Raddatz, 447 U.S. at 682).

[106] *See, e.g.*, Rehnquist, *supra* note 12, at 14-18 (arguing for less expensive adjudication).

[107] *Northern Pipeline*, 458 U.S. at 83-84 (critical analysis turned on review by district court).

[108] *Id.* at 89.

Justice White dissented in *Northern Pipeline*.[110] After extensive review of the plurality opinion and prior case law, he concluded that "Article III is not to be read out of the Constitution; rather, it should be read as expressing one value that must be balanced against competing constitutional values and legislative responsibilities."[111] Justice White then identified the values to be balanced: the strength of the legislative interest should be weighed against the burden placed on Article III values.[112] Like the plurality opinion, Justice White recognized that appellate review by an Article III court might save a statute creating non-Article III courts:

> . . . *Crowell* . . . suggests that the presence of appellate review by an Art. III court will go a long way toward insuring a proper separation of powers. Appellate review of the decisions of legislative courts, like appellate review of state-court decisions, provides a firm check on the ability of the political institutions of government to ignore or transgress constitutional limits on their own authority.[113]

Justice White stopped short of concluding that appellate review by an Article III court is a necessary condition in a legislative court scheme, but his dissenting opinion underscored the importance of review: ". . . a scheme of Art. I courts that provides for appellate review by Art. III courts should be substantially less controversial than a legislative attempt entirely to avoid judicial review in a constitutional court."[114] In the end, despite Justice Brennan's efforts to line up and limit the Court's legislative court decisions, the White approach has prevailed. Indeed, the Court's two post-*Northern Pipeline* decisions rejected the plurality's approach in favor of Justice White's balancing approach urged by Justice White in his *Northern Pipeline* dissent.[115]

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[109] *Id.* at 90.
[110] *Id.* at 92.
[111] *Id.* at 113.
[112] *Id.*
[113] *Id.* at 115.
[114] *Id.*

The first of these post-*Northern Pipeline* decisions, *Thomas v. Union Carbide Agricultural Products Co.*,[116] rejected a challenge to statutorily imposed binding arbitration. The *Thomas* dispute centered around the Federal Insecticide, Fungicide and Rodenticide Act[117] which compelled companies to share research data, but provided for compensation for its use.[118] Congress mandated that disputes concerning such compensation be decided by arbitration with limited judicial review.[119] In a decision probably best understood in context with a caseload crisis mentality, the Court rejected "rigid and formalistic restraints on the ability of Congress to adopt innovative measures such as negotiation and arbitration with respect to rights created by a regulatory scheme."[120] Undoubtedly, the majority had in mind Justice Brennan's categories in his *Northern Pipeline* plurality decision. The *Thomas* Court relied, in part, on the availability of review by an Article III court to uphold the constitutionality of Congress's arbitration scheme.[121]

The second post-*Northern Pipeline* case, *Commodity Futures Trading Commission v. Schor*,[122] securely put in place the approach advocated by Justice White in his *Northern Pipeline* dissent. Under the Commodity Exchange Act,[123] the CFTC could resolve reparation claims brought by customers against commodity brokers.[124] Regulations promulgated by the FTC permitted the Commission to hear counterclaims "aris[ing] out of the same transaction or occurrence."[125] Those counterclaims included state-law contract actions for brokerage fees.[126]

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[115] Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986); Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568 (1985).

[116] 473 U.S. 568 (1985).

[117] U.S.C. §§ 136 et seq. (1982).

[118] *Thomas*, 473 U.S. at 571-72.

[119] *Id.* at 573-74.

[120] *Id.* at 594.

[121] *Id.* at 592 (under circumstances of case, review afforded preserved appropriate exercise of judicial function).

[122] 478 U.S. 833 (1986).

[123] 7 U.S.C. § 1 (1982).

[124] *Id.* at § 18.

In *Schor*, the Court distinguished between "personal" and "structural" interests found in Article III.[127] The Court rejected adherence to "formalistic and unbending rules" and relied instead on various factors.[128] Among these factors was the "extent to which the 'essential attributes of judicial power' are reserved to Article III courts . . . ."[129] That is, "a given congressional decision to authorize the adjudication of Article III business in a non-Article III tribunal [may] impermissibly threaten the institutional integrity of the judicial branch . . . ."[130] The Court considered separation of power concerns, but found them de minimis in *Schor*. Critical to its decisions was the fact that Congress had not withdrawn a class of cases from judicial cognizance.[131]

As important as separation of power concerns, the *Schor* Court recognized an individual litigant's right to an Article III forum. Grounded in Article III, but resembling a due process argument, the *Schor* analysis notes that fairness to a litigant is advanced by having an independent adjudicator.[132] In *Schor*, that factor was not present because "the decision to invoke [the] forum is left entirely to the parties . . . ."[133] Thus, while *Schor's* ad hoc balancing process may lack certainty, it suggests that meaningful review by an Article III court may be necessary to assure fairness in some cases.[134]

Professor Fallon has recently argued that the Court's methodology in *Thomas* and *Schor* "is underdeveloped, its standards obscure"[135] and calls for "increased clarity and coherence."[136] Fallon analyzes as two separate lines of precedent the legislative court cases and the adjunct or administrative agency cases.[137] He urges that the Court reject the first tradition involving legislative courts:

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[125] 17 C.F.R. § 12.19(b) (1988).

[126] *Schor*, 478 U.S. at 840-41 (reversal of lower court ruling that CEA lacked jurisdiction to hear such claims).

[127] *Id.* at 848.

[128] *Id.* at 851.

[129] *Id.*

[130] *Id.*

[131] *Id.* at 854.

[132] *Id.* at 848 (Article III does not confer absolute right to plenary consideration of every nature of claim by Article III court).

[133] *Id.* at 855.

[134] *Id.* at 856 (Art. III, Sec. 1 "serves . . . to safeguard litigants 'right to have claims decided before judges who are free from potential domination by other branches of government' " (quoting United States v. Will, 449 U.S. 200, 218 (1980)).

> As between the two traditions, the second is much more respectful of Article III. The first, which does not even demand Supreme Court review of the judgments of non-Article III adjudicators, provides no internal guarantee against a frightening displacement of Article III courts. By building upon the more promising line of analysis associated with *Crowell*, an appellate review theory uses precedent not merely as a source of constraints on the use of non-Article III tribunals, but as a fountain of normative guidance.[138]

Fallon believes that effective appellate review "can provide an effective check against politically influenced adjudication, arbitrary and self-interested decisionmaking and other evils that the separation of power was designed to prevent."[139] In addition, Fallon also agrees that appellate review assures fairness to litigants.[140]

Since Professor Fallon readily admits that his theory "may be controversial" because it is inconsistent with the rationale of one line of cases,[141] I feel inclined to disagree with him in two minor details. First, no consistent line of reasoning is present in the legislative court cases.[142] Justice Brennan's *Northern Pipeline* analysis attempted to order the field, but was quickly rejected.[143] Nonetheless, *Northern Pipeline* dramatized the need for and lack of coherence in the field. It also merged the two lines of precedent: according to Justice Brennan, unless Congress legislated within one of three narrow categories, it could create an adjunct adjudicator only if significant control over that adjunct remained in an Article III court.[144]

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[135] Fallon, *supra* note 85, at 933.

[136] *Id.*

[137] *Id.* at 946.

[138] *Id.* at 947.

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *See* authorities cited *supra* note 83 and accompanying text.

[143] *See* discussion *supra* notes 86-134 and accompanying text.

Second, since *Northern Pipeline,* the Court has continued its efforts to order the law.[145] The Court has not explicitly held that appellate review is a necessary condition in schemes relying on non-Article III tribunals, but its recent cases point in that direction because of reasons articulated by Professor Fallon: "To the extent that questions of fidelity to legal norms can be immunized from judicial inquiry, separation of powers values are part at risk. The fairness interests of litigants may also be compromised insofar as non-Article III federal adjudicators are tempted by opportunities for self-aggrandizement or are subject to political or other pressures."[146]

Schor and *Thomas* abandoned the analysis developed in a long line of cases.[147] That analysis indeed may be in need of reexamination. However, *Schor* and *Thomas* can best be understood as the Court's efforts to give Congress substantial leeway in finding solutions to the caseload crisis. Brennan's opinion in *Northern Pipeline* created doubt about the constitutional validity of non-Article III adjudicators.[148] But *Thomas*, *Schor*, and Brennan's *Northern Pipeline* opinion nonetheless have a common thread - a belief that Congress's ability to place cases in non-Article III courts may depend on the availability of at least some review by an Article III court.[149]

Consequently, proposals to abandon the right to appeal must be examined in that context. Pressure is on Congress to create alternatives to Article III adjudication,[150] but the ability to move adjudication out of federal district courts is contingent on review of the adjudication by some other Article III court. Thus, in a wide range of cases, the Court ironically must preserve effective review by an Article III court in order to achieve its other goal of lessening the caseload of the district courts.

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[144] *Northern Pipeline*, 458 U.S. at 73 (while independent courts are not required for all federal adjudications where Art. III does apply, Art. I is subject to its provisions).

[145] *See supra* notes 115-34 and accompanying text.

[146] Fallon, *supra* note 85, at 950-51.

[147] While that analysis was often inconsistent, the legislative court cases never articulated a balancing test. Even Justice White, the proponent of the balancing test, recognized that ". . . a balancing approach stands behind many of the decisions upholding Art. I courts." *Northern Pipeline*, 458 U.S. at 113-14.

[148] *See* P. LOW & J. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-SATE RELATIONS 144 (1987)(suggesting that other legislative courts would violate Article III if the *Northern Pipeline* plurality opinion were applied stringently).

[149] *See supra* notes 86-134 and accompanying text.

[150] *See, e.g.*, Rehnquist, *supra* note 12, at 14-18.

Justice Rehnquist's proposal to abandon the appeal of right is bad policy. Determining which cases are worthy of consideration would either produce time-consuming satellite litigation or would lead to an arbitrary selection process.[151] In addition, such a scheme also raises significant constitutional questions. Throughout our history, a federal right holder has almost always had a federal appellate court available to review its case. Professor Eisenberg has argued persuasively that the Framers intended the Supreme Court to hear such cases and that absent such review, Congress cannot cut off access to lower federal courts.[152]

While the Court has never resolved whether Congress can curtail the right of appeal, it has emphasized that Congress' power to place cases within non-Article III courts may turn on the availability of appellate review.[153] Desire for less expensive and more expeditious adjudication may thus make appellate review by an Article III tribunal a constitutional requirement in an increasing number of cases.

III. Judge Posner's Analysis: Crisis and Reform

Many commentators have proposed reforms intended to cure the caseload crisis.[154] This section focuses on Judge Posner's proposals developed in *The Federal Courts: Crisis and Reform*[155] and urges caution in evaluating Judge Posner's proposals for reform.

Judge Posner argues that federal courts are in need of dramatic reform and attempts to argue that his proposals are politically neutral.[156] However, as developed below, no one familiar with Posner's considerable writings will be surprised that his book is rife with political value judgments. Indeed, some of his proposed reforms would unravel liberal reforms made possible by access to federal courts.[157]

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[151] *See supra* notes 53-56 and accompanying text.

[152] *See supra* notes 65-69 and accompanying text.

[153] *See supra* notes 70-149 and accompanying text.

[154] *See supra* notes 13-14 and accompanying text.

[155] *See supra* note 15.

Judge Posner uses several chapters of his book to establish that a crisis exists.[158] He argues that federal courts of appeals "cannot be expanded, beyond a point that seems to have been reached, without creating extremely poor working conditions at the court of appeals level (by making each such court too large to function effectively) or placing unreasonable demands on the Supreme Court."[159] Posner concludes that the "crisis in quantity has endangered the quality of federal justice."[160]

However, in response to this crisis, Posner rejects creation of additional courts of appeals, the addition of new judges,[161] and the proposed creation of a super court of appeals.[162] In response it should be said that while these ideas may be flawed, one committed to federal rights might be willing to accept some of the disadvantages of such alternatives to preserve adjudication by independent Article III judges. But in reality Posner does not want to preserve the current status of federal rights, and this is reflected in his proposed "procedural" reforms.[163]

Short of fuller "more radical measures,"[164] Posner suggests several reforms to bring the crisis under control. For example, he suggests increasing filing fees and the minimum jurisdictional amount. (Since publication of Posner's book, Congress has done just that. Effective May 18, 1989, the minimum amount in controversy for federal diversity jurisdiction is $50,000.) He advocates that the prevailing party be awarded reasonable attorney's fees.[165] He also favors "the expansion of appellate capacity within federal administrative agencies"[166] and a specialized tax court of appeals with exclusive jurisdiction over tax appeals.[167] Most controversial are suggestions that would undo many judicial developments over the past three decades. For instance, he argues for:

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[156] *See, e.g.*, R. POSNER, *supra* note 15, at 208-09 (arguing that judicial restraint is politically neutral).

[157] *See infra* notes 173-78 and accompanying text.

[158] R. POSNER, *supra* notes 15, at 59-166.

[159] *Id.* at 317.

[160] *Id.* at 318.

[161] *Id.* at 99-100.

[162] *Id.* at 162-66.

[163] *Id.* at 319-20.

[164] *Id.* at 319.

> a rededication by federal judges to the principles of judicial self-restraint and institutional responsibility . . . , a reallocation of judicial responsibilities from the federal courts to the state courts, including [among other suggestions] . . . renunciation of habeas corpus jurisdiction to determine the innocence of a state criminal defendant, and finally a greater realism about the interpretation of statutes, and the Constitution and about the economic foundations of many of the common law principles that the federal courts elaborate and enforce.[168]

Posner's "reforms" are undeniably political, dressed up as solutions to the caseload crisis. Having convinced us that we have a crisis, Judge Posner harkens back not only to the place of the collegial judiciary but also presumably to the values of judges willing to ignore the fourteenth amendment and early civil rights legislation, a nice "side effect" of curing the caseload crisis.[169]

Of course, Posner's book has produced critical commentary.[170] Much of the criticism has focused on the political agenda evident below the surface of his procedural reforms.[171] For example, in responding to Posner's suggestion to reduce review of civil rights and habeas corpus cases, Professor Redish observes that "these suggestions . . . are made in a discussion of achieving the goal of docket reduction, despite the fact that, as Posner acknowledges . . ., broader concerns of federalism are at stake in making decisions whether or not to remove such cases from the federal courts."[172]

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[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] *Id.* at 319-20.

[169] *See* Beermann, *Crisis? What Crisis?*, 80 Nw. U.L. Rev. 1383, 1389-1405 (1986). Beermann concludes that Posner's efforts to characterize "these federal jurisdiction problems as ones of forum allocation and economic analysis of externalities sanitizes them beyond recognition." *Id.* at 1405.

[170] *See, e.g.*, Beermann, *supra* note 169, at 1389-1405; Varat, *Economic Ideology and the Federal Judicial Task*, 74 Calif. L. Rev. 649 (1986); Estreicher, *Conserving the Federal Judiciary*, 84 Mich. L. Rev. 569 (1986); Redish, *The Federal Courts, Judicial Restraint, and the Importance of Analyzing Legal Doctrine*, 85 Colum. L. Rev. 1378 (1985).

[171] *See, e.g.*, Beermann, *supra* note 169, at 1389 ("Posner's book completely lacks any discussion . . . of his . . . proposed reforms . . . Any discussion of major reforms to an important institution is incomplete without consideration of social consequences.");

Similarly, Redish accuses Posner of ignoring important value judgments implicit in the allocation of jurisdiction between state and federal courts.[173] Posner argues that forcing a litigant to adjudicate a federal right in state court is acceptable in light of history (Congress did not create general federal question jurisdiction until 1875) and of possible review by the Supreme Court.[174] Posner answers concerns about the state court's inability or unwillingness to protect federal rights by asserting that "today the state courts in all areas of the country can . . . be trusted to protect the innocent of whatever race, creed, national origin, or income, with exceptions too few and isolated to justify federal judicial intervention."[175]

Posner "disregards both the relatively minimal chance of Supreme Court review and the dramatic shifts in the role of the federal courts since 1875."[176] His trust in state courts ignores their "lack of . . . independence from political branches of state government and the lack of uniformity in interpretation of federal rights that would result from increased state adjudication."[177] Urging a shift of cases from federal to state court attacks an article of liberal faith. Posner must be aware that his proposal, if accepted, would reverse many of the gains made by civil rights and other liberal groups over the past thirty-five

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Varat, *supra* note 170, at 673 ("Posner may be insufficiently aware of his own ideology and its effect on his social science analysis.") Estreicher, *supra* note 170, at 570 ("The unstated thesis of this book seems to be: the need to husband or 'conserve' federal judicial resources requires a truly 'conservative' agenda for the federal judiciary.").

[172] Redish, *supra* note 170, at 1389-90.

[173] *Id.* at 1387, 1391.

[174] R. POSNER, *supra* note 15, a 133-34.

[175] *Id.* at 187.

[176] Redish, *supra* note 170, at 1391.

[177] *Id.*

years.[178]

Posner also urges greater judicial self-restraint.[179] He analyzes various kinds of self-restraint, "[i.e.] the judge's trying to limit his court's power over other government institutions."[180] Posner is concerned that federal courts will use up their political and judicial capital.[181] Posner asserts that self-restraint "is not a liberal or conservative position, because it is independent of the politics that the other institutions of government happen to be following. It will produce liberal or conservative outcomes depending on whether the courts in question are at the moment more or less liberal than those institutions."[182] In a different place and time, that point may be well-taken, but its application today has a distinct conservative political flavor.[183] For instance, a review of only a few self-restraint cases demonstrates the Supreme Court's use of prudential doctrines there to prevent litigants from asserting federal rights in federal court. Widely criticized as unprincipled,[184] the Court's standing cases are illustrative.

Prior to the mid-1970s, plaintiffs found standing a low threshold. The Court denied standing in *Sierra Club v. Morton*[185] because the plaintiff, a highly regarded environmental group, failed to allege that any of its members used the Mineral King Valley, the area that the Sierra Club sought to protect from commercial development. But the Court's standing requirement was viewed as a minor procedural bar, easily remedied under liberal federal pleading requirements,[186] a fact confirmed a year later in *United States v. SCRAP.*[187] In fact, during the early 1970s, commentators could argue that the standing requirement ought to be satisfied whenever the plaintiff had sufficient institutional concern and resources to pursue litigation vigorously.[188] Thus, public interest groups normally would have standing if they could assure "concrete adverseness." As long as other Article III requirements were met, an ideological plaintiff could challenge a wide array of governmental action. Therefore, although the Court never formally adopted such a position,[189] this lenient view found support in the case law.[190]

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[178] *See generally*, Beermann, *supra* note 169.

[179] R. Posner, *supra* note 15, at 198-222.

[180] *Id.* at 208.

[181] *Id.* at 205.

[182] *Id.* at 209-09.

[183] *See id.* at 209, n.25 (discussing current literature advocating return to judicial activism whereby judges freely overturned legislation regulation economic activity).

[184] *See, e.g.*, C. Wright, *supra* note 14, at 65 (". . . the decisions on standing are not easy to reconcile on their facts. Nor has the theory on standing questions been much more satisfactory.") *See also* Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 151 (1970)("Generalizations about standing to sue are largely worthless as such."); 3 K. Davis, Administrative Law Treatise § 22.18 (Supp. 1965)(". . . the Supreme Court's law of standing to sue [is] largely worthless as such.").

[185] 405 U.S. 727 (1972).

[186] Fed. R. Civ. P. 15. *See* Sierra Club v. Morton, 348 F. Supp. 219 (N.D. Cal. 1972).

Since that time, however, the Court essentially has adopted a rigorous approach to standing and held that injury in fact is "an irreducible constitutional minimum"[191] for standing. Indeed, the cases since the mid-1970s signal a "major change in direction" from liberalized standing rules.[192] For instance, lack of standing has been used to prevent consideration of several hard questions pressed by liberal organizations. For example, in *Schlesinger v. Reservists Committee to Stop the War*,[193] the Court barred a group opposed to the war in Vietnam from litigating the legality of Congressmen holding positions in the Armed Forces Reserve. In *Simon v. Eastern Kentucky Welfare Rights Organization*,[194] the Court found that the litigants lacked standing to challenge a new IRS regulation allowing hospitals to qualify as charities even though they did not provide free emergency treatment to the indigent. In *Warth v. Seldin*,[195] the Court found that a wide array of plaintiffs, including prospective builders and prospective tenants, lacked standing to challenge a community's restrictive zoning ordinances. The Court also has used standing to bar an attack on a statute permitting disposal of surplus government property to a religious institution.[196] In *Allen v. Wright*,[197] the Court used the standing doctrine to avoid deciding whether segregated schools were charitable institutions within the meaning of the tax code.

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[187] 412 U.S. 669 (1973).

[188] *See, e.g.*, Scott, *Standing in the Supreme Court — A Functional Analysis*, 86 HARV. L. REV. 645 (1973). *See also* K. DAVIS, *supra* note 184, at 208-94.

[189] That position was specifically rejected in Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982).

[190] Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1380-83 (1973)(discussing extent to which "injury in fact" is constitutionally mandated). Much confusion resulted from the Court's decision in Baker v. Carr, 369 U.S. 186, 204 (1962) which emphasized that "the gist of the question of standing" was whether a plaintiff alleged "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.").

[191] *Valley Forge Christian College*, 454 U.S. at 472.

[192] C. WRIGHT, *supra* note 14, at 67.

[193] 418 U.S. 208 (1974).

[194] 426 U.S. 26 (1976).

The recent emergence of this strict standing requirement has coincided with the "public law litigation" revolution in which "lawsuits were designed to coerce systematic reform or curtailment of government actions . . ."[198] The rigorous new standing requirement, perhaps asserted under the guise of neutral self-restraint, has barred consideration of the merits of the underlying dispute in these cases even in instances where no other plaintiff was available to challenge a constitutional violation.[199] By contrast, in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*,[200] the Court relaxed the standing requirements in order to hear a challenge to the Price-Anderson Act.[201] The environmental group and individual plaintiffs challenged the act's limitation of liability for a nuclear accident as a violation of due process and equal protection. The Court granted standing, only to find the act constitutional.[202] As observed by Justice Stephens in his concurring opinion, the majority based standing on a delicate "string of contingencies."[203] The decision might be explained by the Court's desire to dispel uncertainty regarding the constitutionality of the act, but not by principled and consistent application of its own standard.[204]

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[195] 422 U.S. 490 (1975).

[196] *Valley Forge Christian College*, 454 U.S. at 472.

[197] 468 U.S. 737 (1984).

[198] P. Low and J. Jeffries, *supra* note 148, at 15 (discussing Chayes, "Forward: Public Law Litigation and the Burger Court," 96 Harv. L. Rev. 4 (1982)).

[199] *Reservists Committee*, 418 U.S. at 227.

[200] 438 U.S. 59 (1978).

[201] 42 U.S.C.A. sec. 2210 (West 1973).

[202] *Duke Power Co.*, 438 U.S. at 82-94.

[203] *Id.* at 102 (Stephens, J., concurring).

[204] *Id.* at 103.

Abstention poses a similar problem. Abstention is "judge-made . . . not authorized by congressional action, and in fact directly [in contravention of] unambiguous congressional directives . . . to adjudicate cases brought to enforce substantive federal rights."[205] Like standing, abstention and the related "Our Federalism"[206] doctrine have been invoked frequently to bar federal courts from hearing cases involving federal rights favored by the liberal community.

Younger v. Harris[207] and its progeny demonstrate the point most clearly. However, in order to fully understand the impact of *Younger*, one must first gain some perspective by analyzing *Dombrowski v. Pfister*,[208] the earlier precedent which *Younger* supplanted. In *Dombrowski*, the Court faced abusive efforts by state officials to frustrate civil rights organizers. While the facts were extreme,[209] the Court's holding was not tied to those facts and appeared to allow litigants free access to federal court to enjoin state prosecutions that might chill exercise of first amendment rights. Thus the Court held:

> A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of first amendment freedoms. . . . When the statute also has an overbroad sweep. . . the hazard of loss or substantial impairment of those precious rights may be critical. . . The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases.[210]

This quoted language applies in any case involving a threatened prosecution of a person alleging that a statute's overbreadth impairs first amendment rights. In other words, the *Dombrowski* Court did not narrow its holding to its unsavory facts.[211]

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[205] Redish, *supra* note 170, at 1399.

[206] Younger v. Harris, 401 U.S. 37, 43-45 (1971). For a critical discussion of *Our Federalism*, *see* M. Redish, *supra* note 57, at 291-321.

[207] 401 U.S. 37.

[208] 380 U.S. 479 (1965).

[209] For an interesting personal account of the events leading to the Supreme Court's decision, see A. KINOY, RIGHTS ON TRIAL 209-55 (1983).

[210] 380 U.S. at 486.

[211] *See* M. REDISH, *supra* note 57, at 293-94.

Unfortunately, whatever the *Dombrowski* Court might have intended is irrelevant after Justice Black rewrote *Dombrowski* in *Younger v. Harris.*[212] *Younger* restricted access to federal court even where a litigant alleged a chilling effect on free expression. The Court assumed as it subsequently held in *Mitchum v. Foster*[213] that section 1983[214] was an express exception to the Anti-Injunction Act.[215] Thus, the conclusion would follow that Congress gave the federal courts jurisdiction over claims like those raised in *Younger* and its companion cases. Nevertheless, despite the lack of any statutory authority for declining such jurisdictions, the *Younger* Court indeed refused to exercise jurisdiction.[216] Despite being championed as a form of judicial restraint, *Younger* represents a form of back door judicial activism.[217] As observed by Professor Redish, abstention amounts to "a blatant — and indefensible — usurpation of judicial authority."[218]

Younger's analysis of *Dombrowski* has generated strong criticism:

> . . . Justice Black. . . disposed of [*Dombrowski*] with a degree of disingenuosness remarkable even by Supreme Court standards. . . The *Younger* Court's approach to *Dombrowski* . . . misleadingly. . . dismiss[ed] what was in reality the decision's central thrust — recognition of the special nature of first amendment claims and the danger of a chilling effect caused by relegating a litigant's constitutional challenge to a criminal defense — as just so much aberrational dicta.[219]

Younger compels a person to abandon his first amendment rights to avoid prosecution or to litigate his claim along the long road through state court and only then to a federal district court in habeas proceedings, proceedings which Posner incidentally suggests should be dramatically curtailed.[220]

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[212] 401 U.S. 37 (1971).

[213] 407 U.S. 225 (1972).

[214] 42 U.S.C. § 1983 (1981).

[215] 28 U.S.C. § 2283 (1978).

[216] *Younger*, 401 U.S. at 44.

[217] *See* Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 74-75 (1984).

[218] *Id.* at 72.

[219] M. REDISH, *supra* note 57, at 297.

Moreover, the Court has continued to extend "Our Federalism" in post-*Younger* cases. For example, *Younger* applies even if a litigant seeks non-coercive declaratory relief.[221] Presumably, declaratory relief does not create the same friction with state court judges as does injunctive relief.[222] The Court has also applied *Younger* in civil proceedings in which the state is a party.[223] Unlike criminal defendants, civil litigants cannot avail themselves of a federal forum through habeas corpus proceedings and instead must rely on the severely limited chance of review by the Supreme Court.

At some point in the future, judicial self-restraint may frustrate a conservative agenda.[224] However, that was not true during the tenure of Chief Justice Burger and despite characterization of Chief Justice Rehnquist as a conservative opposed to judicial activism, he has fully endorsed cases like *Younger.*[225] Thus, Judge Posner's assertion that self-restraint is a politically neutral and a worthy method for attacking the burgeoning caseload is a hollow and thinly veiled attempt to advance his conservative philosophy.

All in all, my focus on Posner's book is intended to demonstrate a straightforward point. Concern about the caseload crisis can be manipulated to impair the liberal reforms accomplished only because of access to the federal courts. Posner's faith in equivalent justice in state courts[226] flies in the face of the widely held belief that federal courts are sympathetic and expert in adjudicating federal rights.[227]

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[220] R. POSNER, *supra* note 15, at 187-88.

[221] Samuels v. Mackell, 401 U.S. 66 (1971).

[222] *See, e.g.*, Steffel v. Thompson, 415 U.S. 452 (1974). *But see* M. REDISH, *supra* note 57, at 303-04.

[223] *See, e.g.*, Moore v. Sims, 442 U.S. 415 (1979)(*Younger* applied to federal suit to enjoin operation of Texas' judicial protection of minors); Juidice v. Vail, 430 U.S. 327 (1977)(*Younger* barred federal action against state contempt proceedings); Trainor v. Hernandez, 431 U.S. 434 (1977)(*Younger* applied to federal cation brought to enjoin state civil proceedings to recoup fraudulently obtained welfare payments).

[224] R. POSNER, *supra* note 15, at 208-09.

[225] *See, e.g.*, Moore v. Sims, 442 U.S. 415 (1979)(opinion by Rehnquist, J.); Juidice v. Vail, 430 U.S. 327 (1977)(opinion by Rehnquist, J.).

[226] R. POSNER, *supra* note 15, at 187.

[227] Redish, *supra* note 170, at 1390-91.

Before abandoning open access to the federal courts, we ought to examine any number of other reforms. One might simply accept that federal courts must handle the caseload because the nation's business has grown so dramatically.[228] That is, one ought to question conservative critics who portray the federal courts as aggrandizing their position by intruding into the province of the other co-equal branches of government.[229] I have not noticed a diminished role for the executive or Congress. Quite the contrary, the judiciary must expand if it is to function as a check on co-equal branches of government which have grown dramatically over the past fifty years.

If a circuit cannot accommodate more than, say, fifteen judges, more circuits might be preferable to Posner's alternative of removing cases from the federal to the state system.[230] More circuits may result in less uniformity than within the current federal system, but more uniformity, expertise, and sympathy towards federal rights than within the fifty state court systems. Although a super court of appeals may be imperfect, such a court may allow for more circuits because the super court might effectively review inconsistent decisions from the various circuit courts of appeals.[231] Thus, more circuit courts of judges need not yield more uncertain and conflicting case law.

I do not dismiss all attempts to reshape federal court jurisdiction in order to address the caseload problem. A close examination of cases now within the federal system might reveal that some kinds of cases do not require the special protection associated with Article III courts. Perhaps, as urged by Judge Rubin[232] and Professor Wright,[233] diversity jurisdiction ought to be eliminated or altered. Furthermore, a liberal writer might suggest "procedural" reforms different from those urged by Judge Posner. Judges in the Eleventh Circuit, for example, would realize significant diminution of their caseload if states within that circuit were to outlaw the death penalty.[234] However, no one would be fooled that such a suggestion was motivated primarily by concern about overworked federal judges.

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[228] *See, e.g.*, Howard, *supra* note 9, at 368 ("In the 1970's alone, there were seven new federal agencies created, such as EPA and OSHA . . . .").

[229] *See, e.g.*, Grazer, *Toward an Imperial Judiciary*, 41 Pub. Int. 104 (1975); Uddo, *A Wink from the Bench: The Federal Courts and Abortion*, 53 Tul. L. Rev. 398 (1979). Justice Rehnquist has implied the same criticism. *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 604-06 (1980)(Rehnquist, J., dissenting).

[230] *See, e.g.*, Fiss, *The Bureaucratization of the Judiciary*, 92 Yale L.J. 1442, 1463-64 (1983)(increasing number of judges preserves individual judge's responsibility for decision making).

[231] Posner rejects proposals for a national court of appeals. R. Posner, *supra* note 15, at 162-66. For one such proposal, see Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 208-47 (1975).

[232] Rubin, *supra* note 5, at 657.

Reform may come, but I doubt that it will be radical. Like promises to reform the tax code,[235] efforts to reshape federal jurisdiction in Congress would be met by heavy pressure from powerful interest groups.[236] Those with the least political power may be excluded from federal court while they may be the litigants most in need of access to federal court. Thus, significant changes in the caseload are improbable, and many proposed reforms, as discussed above, are unwise.

IV. THE LAWYER'S ROLE

In the previous sections, I have argued that efforts to curtail federal court jurisdiction may raise constitutional concerns[237] and that proposals for reform of federal court jurisdiction are often motivated by ideology, not by concern about the pace of life in judges' chambers.[238] I have also speculated that coherent reform in Congress is improbable.[239] An examination of the recent past demonstrates that calls for reform have not produced significant results. Congress has tinkered with the system, for example, by dividing the old Fifth Circuit into the Fifth and Eleventh Circuits[240] and by creating a limited number of new judgeships.[241] In addition, courts themselves have instituted reforms that have helped move cases more expeditiously without additional resources. For example, the Fifth Circuit has relied increasingly on its summary docket to avoid oral argument[242] and on the power to render decisions without published opinions.[243]

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[233] C. WRIGHT, *supra* note 14, at 127-37. Note that Congress recently responded to such proposals and increased the minimum amount in controversy for federal diversity jurisdiction to $50,000. However, it could be seriously questioned whether the last such increase (to $10,000) had any real effect on the case load or if plaintiff's attorneys merely responded by adjusting the damages clause.

[234] By some estimates, as much as 30 percent of the work of the Eleventh Circuit is devoted to death penalty cases. "Lawyers for Death Row," The Washington Post, January 11, 988, Sec. A, p. 10 (Judges on the Eleventh Circuit complain that "more than 30 percent of its docket is tied up with death penalty cases.").

[235] *See* Bittker, *Tax Reform — Yesterday, Today, and Tomorrow*, 44 WASH. & LEE L. REV. 11, 13 (1987)(describing political compromise leading to 1986 Tax Reform Act); Yorio, *Equity, Efficiency and the Tax Reform Act of 1986*, 55 FORDHAM L. REV. 395, 395 n.2 (1987)(describing history of passage of the act).

[236] *See* C. WRIGHT, *supra* note 14, at 137 ("It is unfortunate that the future of diversity jurisdiction is not likely to be resolved by objective consideration of the arguments for and against this head of jurisdiction. Any proposal to modify diversity meets immediate organized opposition from those who believe that they have a vested interest in preserving, for their own advantage, the widest possible choice of forum."); Sheran & Isaacman, *State Cases Belong in State Courts*, 12 CREIGHTON L. REV. 1, 52 (1978)(diversity is still strongly supported by the Association of Trial Lawyers of America and corporate lawyers).

[237] *See supra* notes 57-149.

Recent reforms demonstrate what is likely to be the course of the future: many of the changes will make more efficient use of limited judicial resources.[244] In this section, I examine the role of the lawyer in the appellate process. While curtailing federal jurisdiction radically is undesirable and politically unlikely, properly educated appellate lawyers can make the system work more expeditiously and thus diminish part of the caseload problem.

Former Chief Justice Burger has been a frequent critic of legal education and lawyer competence.[245] In a 1973 speech, the

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[238] *See supra* notes 155-231.

[239] *See supra* notes 232-36.

[240] Fifth Circuit Court of Appeals Reorganization Act of 1980, 28 U.S.C.A. §§ 41, 44, 48 (West Supp. 1988). *See* Reavley, *The Split of the Fifth Circuit: Update and Finnis*, 12 Tex. Tech. L. Rev. 1 (1981); Wisdom, *Requiem for a Great Court*, 26 Loy. L. Rev. 787 (1980).

[241] *See* C. Wright, *supra* note 14, at 12.

[242] *See* Rubin, *supra* note 5, at 650.

[243] *See Proceedings*, *supra* note 8, at 549 (remarks of Judge Rubin).

[244] In preparing this paper, I located a report less than ten years old which concluded after deliberation that word processing would speed up distribution of draft opinions. It was more cautious in its assessment of electronic mail. *See* J. Greenwood & L. Farmer, The Impact of Word Processing and Electronic Mail on United States Courts of Appeals (1979). New technologies will inevitably help the judicial process. For example, computers which can transform the spoken word to type-written form will bring obvious time savings in preparation of trial transcript, draft opinions and correspondence.

[245] *See, e.g.*, Burger, *The Special Skills of Advocacy: Are Specialized Training and*

Chief Justice observed that "many judges in general jurisdiction trial courts have stated. . . that fewer than 25 percent of the lawyers appearing before them are genuinely qualified; other judges go as high as 75 percent."[246] He cited one former colleague who put at two percent the number of genuinely qualified lawyers.[247]

Inadequate appellate counsel impairs the process in two important ways. The first is that counsel may file frivolous appeals that should not be appealed at all.[248] For example, an appeal may raise a challenge to findings of fact beyond the reach of an appeals court or a claim which has been waived because of a procedural default. Most of the attention on frivolous litigation has focused on this kind of inadequacy.[249] The stereotypical overly litigious appellants are attorneys who represent criminal defendants, especially death row inmates,[250] and prisoners who become persistent writ writers in post-conviction and civil rights cases.[251]

Less visible is the time lost as a result of a second form of incompetence: poor briefs and inept appellate argument. Judges' criticism of the poor quality of briefs is often sharp.[252] They contend that many briefs are useless to the court. Inadequate briefs waste valuable judicial resources. The late Judge Tate's criticism underscores that the judge is compelled to perform the attor-

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Certification of Advocates Essential to Our System of Justice, 42 FORDHAM L. REV. 227 (1973).

[246] *Id.* at 234.

[247] *Id.* at n.14 (citing Tamm, *Advocacy Can be Taught — The N.I.T.A. Way*, 58 A.B.A. J. 625 (1973).

[248] A great deal of attention has been given frivolous appellate litigation. *See* Cochran, *Trouble on the Horizon: The Caseload Problem with the "Frivolous Appeal,"* 2 FIFTH CIRCUIT REP. 249, 251 nn.27-28 (1985).

[249] *See* Martineau, *Frivolous Appeals: The Uncertain Federal Responses*, 1984 DUKE L.J. 845, 848 (focus on "use of sanctions to penalize appellants and their attorneys . . . .").

[250] *See, e.g.*, Barefoot v. Estelle, 463 U.S. 880,895 (1983)(discussing successive habeas corpus petitions); Brogdon v. Butler, 824 F.2d 338, 343-44 (5th Cir. 1987)(Clark, J. concurring)(emphasizing need to impose sanctions for delay in death penalty cases).

[251] *See* Cochran, *supra* note 248, at 251. *See also* Gabel v. Lynaugh, 835 F.2d 124 (5th Cir. 1988).

[252] *See, e.g.*, Burger, *supra* note 245, at 231 n.8; Tate, *Federal Appellate Advocacy in the 1980's* 5 AM. J. TRIAL ADVOC. 63 (1981), *reprinted in* R. MARTINEAU, CASES AND MATERIALS ON APPELLATE PRACTICE AND PROCEDURE 55-56 (1987).

ney's work when the appellate brief is inadequate:

> If the brief is turgid, if it is long-winded in making its points, if the issues it raises are unnecessarily numerous (and from experience an appellate judge senses many arguments of error indicate a grasping at weak straws in the absence of even one strong contention), the brief is less likely to direct the judge's attention to the points the advocate wishes to make. For the most effective contribution to the judge's decision of an appeal, it is essential that the appellate advocate make careful selection of issues, authorities and relevant facts to be cited, describe them accurately (including their weaknesses) with appropriate citation, and be concise and lucid in presentation of the argument. Otherwise, the appellate judge may use the brief only for a cursory check of the result reached by a proposed opinion, virtually as if counsel had filed no brief at all.[253]

The extent of poor briefing is difficult to estimate, but judges suggest that it is significant.[254]

Commentators can identify a number of causes for such poor advocacy,[255] and legal educators cannot avoid a substantial portion of the blame. For example, an ABA report criticized law schools for their role in producing inadequate appellate attorneys.[256] Their failings are several. One is inattention to appellate skills.[257] Two, despite almost exclusive emphasis on appellate opinions, law professors ignore appellate courts as institutions, leaving the lawyer ignorant about "functions of the appellate court (error correction and law development), the goal of the appellate judge. . ., and the difference in functions between an intermediate appellate court and a supreme court. . . ."[258] Students graduate ignorant of appellate jurisdiction, appellate rules, and trial rules (like issue preservation) that affect appellate litigation.[259] These gaps in a litigator's knowledge add inappropriate appeals to the caseload because attorneys file suits properly dismissed on procedural grounds apart from the merits.

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[253] Tate, *supra* note 252, at 67-68.

[254] *Id.*

[255] *See, e.g.*, M. Fontham, Written and Oral Advocacy (1985) at 53-54.

[256] *Appellate Litigation Skills Training: The Role of the Law Schools*, 54 U. Cin. L. Rev. 129, 133 (1985) Report and Recommendation of the Committee on Appellate Skills Training, Appellate Judges' Conference, Judicial Administration Division of the American Bar Association.

[257] *Id.* at 131.

[258] *Id.* at 137.

The ABA recognized that the vast majority of law schools teach advocacy courses. Those courses are singled out for special criticism:

> First and foremost, these programs treat appellate litigation as involving only two aspects — writing a brief and making an oral argument. They ignore all of the other important ingredients of appellate litigation . . . Second, . . . because they lack a realistic appeal record they do not aid in the development of the skill that is unique to appellate litigation: building a case out of a record. Third, as a result of the first two defects, the issues argued in these programs are usually abstract legal questions without factual content upon which most appeals are decided.[260]

The report's conclusion is poignant: as taught in most schools, moot court programs "do not and cannot be thought of as contributing to appellate skills training."[261]

Law schools must respond to the report. We can do a better job training advocates. However, any such reforms in the law school curriculum will improve only the skills of *future* lawyers and thus will not significantly affect the nature of appellate practice for many years. If the ABA report is correct, most of the appellate lawyers currently practicing in the federal courts were inadequately trained in law school and continue to ply their trade inadequately. Therefore, beyond reforms in legal education, steps must be taken to address the deficiencies of current litigators.

In that regard, it is noteworthy that courts and legislators nationwide have increased interest in sanctions as a way to dam the flood of litigation.[262] Many courts and legislators believe that "frivolous suits have diverted away scarce judicial resources."[263]

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[259] *Id.* at 138.

[260] *Id.* at 142. *See also* M. FONTHAM, *supra* note 255, at 54.

[261] *Id.*

[262] *See generally* Cochran, *supra* note 248; Martineau, *supra* note 249.

[263] Fleming Sales Co. v. Bailey, 1 Fed. Rules Serv. 3d 1501, 1508 (N.D. Ill. 1985).

That is, many believe that imposing sanctions will deter a significant number of lawsuits: ". . .there is a now-identifiable trend to put in place what some believe to be sufficient deterrence factors in the form of assessments of monetary sanctions against unsuccessful litigants and their attorneys for [filing frivolous appeals]. This, its proponents believe, will in turn reduce the number of future appeals."[264]

Despite concerns that "the standard for imposing sanctions is not so liberalized as to chill the vigorous litigation of legitimate claims and defenses,"[265] some courts have begun to employ sanctions in questionable cases. For example, Professor Cochran has argued that in *Hagerty v. Succession of Clement*,[266] the Fifth Circuit used "improper criteria for the imposition of sanctions."[267] The court has also imposed sanctions on *pro se* state prisoners. In *Gabel v. Lynaugh*,[268] the court taxed costs of $10 against prisoners who failed to present the issue appealed upon to the lower court. *Gabel* does not make clear whether the panel was motivated by a desire to deter frivolous litigation or by a need to express its pique.

Concern has been voiced that sanctions will be used to impair open access to courts. To be sure, such access is a positive value in our system.[269] Thus, using sanctions as a device to shift attorneys' costs, for example, to the losing party is a strong sanction that could quite likely over-deter plaintiffs from asserting legitimate rights. Even in the current climate of caseload crisis, we should remember that positive law reform has been possible because litigants have been willing to press novel theories.[270]

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[264] Cochran, *supra* note 248, at 251.

[265] *Id.* at 257.

[266] 749 F.2d 217 (5th Cir. 1984).

[267] Cochran, *supra* note 248, at 260 (court's analysis ignores notice requirement before imposition of sanctions; court failed to impose requirement of attorney's knowledge of frivolous nature of appeal before sanctions can be imposed under 28 U.S.C. § 1927).

[268] 835 F.2d 124 (5th Cir. 1988). The court found the appeal frivolous because "we are a court of errors and appeals; and the trial court cannot have erred as to matters which were not presented to it." *Id.* at 125. There are exceptions to that rule, of course. *See* Rojas v. Richardon, 703 F.2d 186 (5th Cir. 1983)(setting criteria for plain fundamental error). The court in *Gabel* also failed to acknowledge that frivolous appeals can often be screened without significant investment of judges' time. *See* Cochran, *supra* note 248, at 261.

[269] F. Coffin, *supra* note 25, at 16-17. In cases involving indigents, the Supreme Court has frequently emphasized the importance of access to the court system. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971)(state may not deny access to court for indigents who seek dissolution of marriage); Johnson v. Avery, 393 U.S. 483 (1969)(where prisoners not allowed to assist others in preparation of writ there is denial of access to court for illiterates); Douglas v. California, 372 U.S. 353 (1963)(denial of counsel to indi-

Thus, the challenge for courts is how to use sanctions to improve the efficient operation of the court system without deterring litigants from pursuing law reform. In *Thomas v. Capital Security Services, Inc.*,[271] the Fifth Circuit *en banc* interpreted amended Rule 11, requiring the district court to impose sanctions in certain instances. The court emphasized that drafts of the amendment to Rule 11 "expressly disclaim[ed] any intent to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories."[272]

The Fifth Circuit emphasized that district courts must avoid a "natural tendency. . . to gravitate toward imposing" attorneys' fees and costs as sanctions for violations of Rule 11.[273] Instead, "[s]anctions should be educational and rehabilitative in character and, as such, tailored to the particular wrong."[274] Balancing open access to the courts and the need to deter frivolous litigation, the Fifth Circuit "specifically adopt[ed] the principle that the sanction imposed should be the least severe sanction adequate to the purpose of Rule 11."[275] To be sure, the district court's broad discretion includes a wide array of appropriate sanctions. For example, "[w]hat is 'appropriate, may be a warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, monetary sanction, or other measures appropriate to the circumstances."[276] I urge a similar approach to handle frivolous litigation or poor briefing in

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gent on appeal violates fourteenth amendment).

[270] *See, e.g.*, Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985)("Vital changes have been wrought by those members of the bar who have dared to challenge the received wisdom, and a rule that penalized such innovation and industry would run counter to our notions of the common law itself.").

[271] 836 F.2d 866 (5th Cir. 1988)*(en banc).*

[272] *Id.* at 877.

[273] *Id.*

[274] *Id.*

[275] *Id.* at 878.

[276] *Id.*

the appellate court.[277]

I want to particularly emphasize that judges spend a great deal of unnecessary time on items other than frivolous appeals. Commentators have been quick to link wasted judicial time to meritless appeals.[278] That may be true, although in many instances staff counsel identifies such cases, avoiding waste of judicial time.[279] However, poor briefs in non-frivolous cases may waste far more judicial time. A poor brief means that a judge "may use the brief only for a cursory check of the result reached by a proposed opinion, virtually as if counsel had filed no brief at all."[280] Such briefs are quite common in certain classes of cases,[281] notably in post-conviction litigation and in section 1983 litigation. In such cases, the state often submits a "thin" brief with knowledge that the appellate court will do its work. Those two categories of cases comprise a significant portion of the Fifth Circuit's caseload.[282]

I propose that the court rebel against attorneys who waste the court's time. Judges with whom I have spoken informally confirm that state and government attorneys are frequent offenders and that, because the state or United States eventually prevails, the offense goes unnoticed.[283] Courts have available draconian sanctions, for example, dismissal or monetary sanctions.[284] Those ought to be last resorts, but a court would discover dramatic improvement in the quality of appellate briefs with eventual concomitant time savings if it refused to accept poor briefing by counsel. Following the suggestions in *Thomas*, a court could inform counsel of the inadequacies of his brief, in private, in open court, or in its written opinion.[285] It might refuse to accept careless, indifferent briefs and compel resubmission of the brief. It might also compel the attorney to attend a continuing legal education seminar. If the latter sanction were imposed, some aspiring law school or professional association would undoubtedly quickly put in place a meaningful CLE program, perhaps modeled on the highly successful N.I.T.A. trial advocacy program.[286]

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[277] Appellate courts have similar discretion available. *See* Martineau, *supra* note 249, at 857-64 (discussing various sources of authority to impose sanctions); *id.* at 869-70 (discussing non-monetary sanctions).

[278] *See, e.g., id. See also* discussion *supra* at notes 262-68.

[279] *See* Cochran, *supra* note 248, at 261 (suggesting that frivolous appeals lend themselves to dismissal without significant investment of time); Rubin & Ganucheau, *Appellate Delay and Cost — An Ancient and Common Disease: Is it Intractable?*, 42 Md. L. Rev. 752 (1983) (describing procedures within Fifth Circuit).

[280] Tate, *supra* note 252, at 68.

[281] This observation is based on discussions both with a number of attorneys and with judges.

[282] For example, prisoner cases and direct criminal appeals represented almost 42% of the Fifth Circuit's caseload in 1986-87. Clerk's Annual Report *supra* note 36, at 13. *See also, id.* at 2 (prisoner appeals cases increased by 353% between 1986 and 1987).

[283] Undoubtedly, the public interest requires that the court not release a prisoner as a sanction for ineffective representation by counsel for the state or government. And yet the fact that courts perform much of the work for the attorney encourages bad work habits. The attorney falsely assumes that winning the appeal was a result of his efforts.

[284] Most of the law on sanctions at the appellate level is aimed at appellants' con-

The Fifth Circuit already recognizes its obligation to help educate members of the practicing bar. Members of the Fifth Circuit have participated in various educational programs.[287] They offer a unique perspective.[288] When they speak candidly about their approach to attorneys' work product, the bar listens.

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duct. *See* Martineau, *supra* note 249 at 864-70 (reviewing bases for sanctions). But the court's power to impose sanctions on an appellee might be found in the inherent authority of the court, Roadway Express, Inc., v. Piper, 447 U.S. 752, 764-67 (1980), or in the federal rules of appellate procedure. FED. R. APP. P. 47 (authorizing each circuit to adopt rules not inconsistent with the appellate rules).

[285] Courts have used similar sanctions to reprimand appellants' attorneys. *See, e.g.*, United States v. Potamkin Cadillac Corp., 697 F.2d 491, 495 (2d Cir.)(criticizing attorney for undue delay and vexatious multiplication of proceedings), *cert. denied*, 462 U.S. 1144 (1983); Shuffman v. Hartford Textile Corp., 659 F.2d 299, 305 (2d Cir. 1981)(observing that attorney unreasonably prolonged litigation), *cert. denied*, 455 U.S. 1018 (1982).

[286] *See* Tamm, *supra* note 247 (describing N.I.T.A. trial advocacy program).

[287] *See* example, Fifth Circuit judges participate frequently in the Appellate Advocacy Seminar sponsored by the Bar Association of the Fifth Federal Circuit. Judges' remarks are frequently reprinted in the Fifth Circuit Reporter. *See, e.g.*, Talk by Judge Sam D. Johnson, 2 Fifth Circuit Rep. 345 (1985); Talks by Judges Rubin and Higginbotham, 2 Fifth Circuit Rep. 143 (1985).

[288] The following excerpts from Judge Reavley's remarks at the 1986 seminar demonstrate the kind of candid and helpful insights offered by the judges:

> III. The judge of your case probably will prefer to affirm the trial court and may be weary of the extreme adversarial posture. The judge loveth an honest advocate.
>
> IV. When the judge of your case reads your brief, she will probably not be savoring it with a cool drink on the beach. Nor will she have high anticipation or great curiosity about your cases. She will hope to spend a minimum amount of time to get in mind, promptly and accurately, the relevant facts and the issues which she must decide in order to get your case off her docket.

Fifth Circuit Appellate Practice and Advocacy Seminar, Oct. 23-24, 1986, G-2.

Thus, in addition to sanctions, the Court might consider mandating participation in such programs as a condition of membership in the appellate bar.

The current literature on the appellate process contains many more suggestions on how the appellate courts can deal with caseload pressure. For example, Professor Martineau has advocated a more informal dialogue between judges and attorneys than the all too short formal oral argument.[289] Such discussions might be by conference calls, saving travel time for judge and litigants. Follow up discussions might save the courts' time because attorneys could research areas of the law which under our current approach must be researched by judges and their clerks if those issues are inadequately addressed in the appellate briefs.

Even if we retain formal oral argument, courts might save judicial time by requiring attorneys to submit additional briefs on matters which are inadequately briefed, but which trouble the judges. Unlike my earlier discussion of poor briefing, even counsel who has effectively argued an issue may not have anticipated all of the court's concerns. In both instances, though, I propose that courts save their resources by compelling attorneys to do their own work. Many attorneys would welcome the chance to address the court's specific concerns. No doubt, losing attorneys are greatly frustrated if an opinion is based on analysis not presented in the prevailing party's brief.

This discussion is not exhaustive of possible reforms. Instead I want to generate interest in reforming the appellate process by better management of resources rather than by closing the door to federal right holders. The caseload crisis should remind federal courts that litigants hold them in high regard.

V. Conclusion

When Judge Jolly invited me and fellow panelists to speak at the 1988 Fifth Circuit Judicial Conference, he asked us to consider appeals in the twenty-first century. Appellate practice will change in subtle ways which most of us cannot anticipate. However, while appeals will change, I doubt that the changes will be drastic.

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[289] *See* Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 Iowa L. Rev. 1, 30-31 (1986).

As a response to the increased caseload, some people have urged curtailing the appeal of right. That position is premised on the assumption that Congress may eliminate the courts of appeals entirely or shape its jurisdiction however it desires. While not free from uncertainty, such proposals may be unconstitutional.[290] For example, the Supreme Court's legislative courts decisions allow a trade off, permitting Congress to place considerable responsibility for Article III cases in non-Article III bodies. However, essential to such schemes is availability of review by an Article III court. Hence, in many cases, appellate review has become constitutionalized.[291] More importantly, appeals courts now serve the review function originally served by the Supreme Court.[292]

Efforts to reshape federal court jurisdiction are frequently politically motivated. Heavy weight interest groups will effectively scuttle major restructuring of federal court jurisdiction. Non-political proposals may succeed in Congress, but will only involve tinkering with the system and will not change the appellate process in dramatic ways.[293]

Instead, the appellate courts will do what they have done traditionally. They will rely on new technology to improve the process and they will make better use of existing resources.[294] In this article, I have paid particular attention to the role of the lawyer in the appellate process. I concur in observations that lawyers often perform inadequately. Inadequate briefing results in significant loss of judicial time. In many cases, especially those involving post-conviction relief and prisoners' rights, courts do the work for the state. Sensitive use of non-monetary sanctions in such cases could shift responsibility back to attorneys to do their own work, with measurable savings to the appellate courts.

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[290] *See supra* notes 59-149 and accompanying text.

[291] *See supra* notes 70-149 and accompanying text.

[292] *See supra* notes 59-69 and accompanying text.

[293] *See supra* notes 154-236 and accompanying text.

[294] *See* Estreicher, *supra* note 170, at 570-77.

OWNERSHIP OF CROPS ON FORECLOSED LAND, PRIORITY OF CROP LIENS AND AFTER-ACQUIRED PROPERTY CLAUSES IN FARM BANKRUPTCIES

*Preston D. Rideout, Jr.**

I. The Farm Economy in General

> Both in their violence and their uprising they were being faithful to American tradition. . . . At Council Bluffs sixty had been arrested, but when a thousand of their fellow insurgents marched on the jail, they were hastily released. . . . . On the outskirts of a Kansas village police found the murdered body of a lawyer who had just foreclosed on a five-hundred-acre farm. . . . . Throughout Hoover's last winter as President there were foreclosure riots in Iowa . . . Lawyers representing insurance companies in the East were kidnapped and threatened with the noose until the home office relented and agreed to a mortgage moratorium. By the end of January 1933, John A. Simpson, president of the National Farmers Union, told the Senate Committee on Agriculture, "The biggest and finest crop of revolutions you ever saw is sprouting all over this country right now." Edward A. O'Neal, III, president of the American Farm Bureau Federation, added "[u]nless something is done for the American farmer we'll have revolution in the countryside in less than twelve months."[1]

Reminiscent of those last days of the Hoover Administration, our current farming industry has become overwhelmed with economic difficulties. America's agricultural industry, basic to our entire economy, has reached a crisis stage and the resultant problems are complex.[2] For instance, from 1979 to 1986 net farm income in Mississippi alone dropped an astronomical 500 million dollars, and one estimate put as many as one-third of its farmers on the verge of bankruptcy.[3] Indeed, the extent of the current crisis in Mississippi is aptly illustrated with a survey of the statistics for 1986, one of the worst years on record for Mississippi farmers.[4] In that year, the state suffered its worst drought in twenty-five years reducing yields by thirty-five percent, and farm income dropped to its lowest level in thirty years, down nearly fifty percent from 1985.[5]

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[1] W. Manchester, The Glory and the Dream, A Narrative History of America 59 (1973).

In addition, beyond the problems of nature, there were even greater systemic problems. For example, U.S. farm exports, which peaked in 1981 at forty-four billion dollars, fell thirty-seven percent to 27.5 billion in 1986.[6] In that same year, U.S. agricultural exports to twenty-two of twenty-five consumer nations were down significantly from 1985.[7] This dramatic decline devastated farm operations in Mississippi, particularly in the Delta where at least fifty percent of agricultural sales are made to overseas buyers.[8]

The origins of this problem can be traced to a period of time between the mid-1970s and the early 1980s when the upward spiral of inflation created increased cash flows and spurred many farmers to buy additional land at inflated prices with money borrowed for a long term at high interest rates. The equity produced by continued inflation through the end of this period created collateral against which these farmers could borrow additional funds and allowed them to service their land debt and continue operations. However, from the early 1980s to the present, the near disappearance of inflation, along with the precipitous decline in the export market, have caused a dramatic deflation in the value of land and thus the disappearance of the essential equity. For example, in Iowa, one of the hardest hit farm states, land values have dropped sixty-four percent since 1981.[9] In fact, since 1982 the value of farmland nationwide has plummeted by an average of thirty-three percent.[10] The most severe declines in 1986 were in the states of Alabama, Mississippi and Louisiana where land values dropped sixteen percent on the average."[11] Thus, farmers who obligated themselves in the late '70s and early '80s to long-term mortgages at high interest rates are now unable to service their huge land debts.[12]

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[2] The Kiplinger Washington Letter, Aug. 28, 1987, at 1.

[3] *See* Espy, *Citizen's Must Help Officials Overcome State's Obstacles*, Clarion-Ledger (Jackson, Miss.), Jan. 4,1987, at 1-H, col. 3 (Mississippi Congressman Mike Espy discussing proposed solutions to help revive Mississippi's depressed farming industry).

[4] Alderman, *Farmers Suffer Bitter Disappointment in 1986*, Commonwealth, Dec. 29, 1986, at 1.

[5] *Id.*

[6] Mississippi Economic Council, *Mississippi Delta Hit Hardest By The Decline In Exports*, *Mississippi Bus.*, Dec. 22, 1986, at 1.

[7] *Farming*, THE J. OF FIN. MGMT. FOR FARMERS AND RANCHERS, Nov.-Dec. 1986, at 11.

[8] Mississippi Economic Council, *supra* note 6, at 1.

II. The System of Agricultural Finance and the Current Crisis

At the center of this financial crisis is a complex system of agricultural finance, heavily laden with government programs and regulations. Cash flow in the agricultural economy depends primarily on three lending institutions, the largest being the Farm Credit System (FCS), a creature of Congress. The FCS was originally established to provide a stable source of capital for agricultural producers, and at its inception seventy years ago it was capitalized by the federal government.[13] However, in the mid-1960s, the borrower/owners of the system repaid the last of the federal funds.[14] Two arms of the FCS deal directly with agricultural producers: the Federal Land Bank and the Production Credit Associations. The Federal Land Bank was established in 1916 under the provisions of the Federal Farm Loan Act.[15] Its role in the system is to make long-term mortgage loans for the purchase of land in rural areas.[16] As part of the Farm Credit Act of 1933,[17] Congress created local Production Credit Associations (PCA's) with their primary purpose being to make short-term crop production loans.[18]

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[9] Welsh, *Land Deals You Can Make Today*, Farm J., Sept. 1987, at 22.

[10] H.R. Rep. No. 100-295, 100th Cong., pt. 1, at 57 (1987). Based on this report, Congress enacted the Agricultural Credit Act of 1987. Pub. L. No. 100-233, 101 Stat. 852 (1987).

[11] Welsh, *supra* note 9, at 22.

[12] H.R. Rep. No. 100-295, *supra* note 10, at 56.

[13] 12 U.S.C. § 2001 (1982).

[14] H.R. Rep. No. 100-295, *supra* note 10, at 61.

[15] 2 J. Davidson, Agricultural Law, § 10.01 (1981).

Since 1933, there have been no significant changes in the structure of the Farm Credit System.[19] The FCS's total loan portfolio is now valued at 70.9 billion dollars,[20] although it has admittedly decreased in the last five years.[21] Nevertheless, Federal Land Banks have continued to command the market for farm mortgage credit, currently financing forty-three percent of the farm real estate market.[22]

The second largest agricultural lender is actually a group of lenders comprised of life insurance companies and other commercial lenders which now hold approximately twenty-two percent dollarwise of all outstanding agricultural mortgages.[23] Insurance companies alone hold 11.6 billion dollars in agricultural loans nationwide.[24]

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[16] 12 U.S.C. § 2014 (1982). There are stipulated circumstances under which the Federal Land Banks are authorized to make continuing commitments on these long-term real estate loans. *Id.* The land banks can extend financial assistance to eligible borrowers for loan periods ranging between five and forty years. *Id.*

[17] W. STOKES, CREDIT TO FARMERS 41 (1973). The Farm Credit Act of 1933 was signed on June 16, 1933 by President Roosevelt after considerable congressional debate. *Id.* at 38. Congressman Wall Doxey of Mississippi was a sponsor of the bill and he laid down a principle which the system would have done well to have taken to heart:

> . . . the foundation and groundwork on which it (the Farm Credit Act of 1933) is based is sound business, economical administration, good banking, and mutual helpfulness and benefit to both the lender and the borrower through cooperative efforts of the government and the family.

Id. at 39.

[18] 12 U.S.C. § 2096 (1982). PCA's may also offer similar financial assistance, under qualified terms, to rural residents for housing and to persons furnishing farm-related services to farmers and ranchers. *Id.*

[19] H.R. REP. No. 100-295, *supra* note 10, at 64. The Farm Credit System is a nationwide cooperative with approximately 382 local associations owned wholly by the farmers and ranchers that borrow from them. H.R. REP. No. 100-295, *supra* note 10, at 65.

[20] Bailey and McCoy, *Tricky Ledgers to Hide Huge Losses, Financial Officials Use Accounting Gimmicks*, Wall St. J., Jan. 12, 1987, at 1, col. 6.

[21] H.R. REP. No. 100-295, *supra* note 10, at 65. In January, 1987 the FCS reported a loss of $4.2 billion. Bailey and McCoy, *supra* note 20, at 1.

[22] H.R. REP. No. 100-295, *supra* note 10, at 66. Although there has been competition from other institutions, the Farm Credit System's ability to obtain funds in capital markets on Wall Street historically allowed the system to offer lower interest rates to farmers and ranchers. The system's current problems have caused the loss of this competitive edge. *Id.* at 65.

[23] *Id.* at 66.

The nation's third largest agricultural lender is an assortment of federal agricultural loan programs, most of which are administered through the Farmers Home Administration (FmHA).[25] In contrast with the FCS, which has traditionally concerned itself with meeting the credit needs of the efficient commercial farmer through conventional banking principles, the FmHA was originally created to keep destitute small farmers on their land and to help them subsist through programs patterned after the Depression era Rural Rehabilitation programs. This focus was somewhat modified in the Agricultural Credit Act of 1961 which established the basic structure and content of today's FmHA programs.[26] FmHA has four basic loan programs: long-term loans for the purchase of farmland; short-term loans to meet operating expenses; emergency disaster loans to assist producers with losses caused by natural disaster, and economic emergency loans which assist producers with miscellaneous economic problems beyond their control.[27] In September 1986, FmHA held 14.2% of all agricultural loans, valued at 29.6 billion dollars.[28]

Due to the downturn in the agricultural economy, these lenders have acquired literally millions of acres of land through foreclosures and bankruptcies.[29] FmHA alone now owns 46,000 farm properties with a combined acreage greater than the land area of Rhode Island.[30] Dubbed the "farm lender of last resort," the FmHA has 270,000 loans. Of this number, approximately one-third of the debtors are having problems making repayment.[31] In six years the dollar amount of delinquent loans has risen from 820 million dollars to 6.3 billion dollars. Of that 6.3 billion dollars, 4.8 billion dollars (76%) is overdue by three years or more and a significant portion may never be recovered.[32]

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[24] Mosby, *Effects of Farm Bankruptcy Statute Already Being Felt*, Clarksdale Press Reg., Dec. 12, 1986, at 1.

[25] 7 U.S.C. § 1981 (1982).

[26] 2 J. Davidson, *supra* note 15, at §§ 11.01-11.11.

[27] H.R. Rep. No. 100-295, *supra* note 10, at 71.

[28] *Id.*

[29] The Kiplinger Washington Letter, *supra* note 2. *See also* Welsh, *supra* note 9, at 22 (Farm Credit Services and Farmers Home Administration desire to dispose of acquired land has resulted in increased activity in the land market).

[30] H.R. Rep. No. 100-295, *supra* note 10, at 72. The FmHA obtained these properties through forced liquidation (i.e. foreclosure) and through voluntary conveyances. (deed in lieu of foreclosure). *Id.*

In addition to these uncollected FmHA debts, the FCS, as of June 30, 1987, was holding loans totalling 6.47 billion dollars for which neither principal nor interest payments were expected.[33] The FCS reported losses in 1985 of 2.7 billion dollars and 1.9 billion dollars in 1986. It likewise projected total losses for 1987 of 1.28 billion dollars, 1.09 billion dollars for 1988, and 742 million dollars for 1989.[34] The epidemic has also spread to private institutions. For instance, between 1984 and April of 1987, 168 farm banks failed nationwide.[35]

The future is not significantly brighter. As of October 1987, agricultural exports were up seventeen percent over 1986. However, virtually all of the increases were in cotton, livestock, fruits, and vegetables, and the cost to the government was 2.3 billion dollars in subsidies.[36] Land values in 1987 began to stabilize,[37] but because government subsidy payments supported the value in many cases, the only good investments were considered to be in land which could support itself without a subsidy.[38] In land acquisition, agricultural producers today are emphasizing return on investment, not the price of the land.[39] The most recent proposal to Congress is to cut farm subsidies by forty-two percent by the end of 1991.[40] Consequently, if price supports are reduced, exports will again decline, and the value of any farmland dependent upon subsidy payments will in all probability decline sharply. If so, the problems of recent years can only be expected to continue and intensify.[41]

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[31] Bailey and McCoy, *supra* note 20, at 18, col. 2.

[32] H.R. REP. No. 100-295, *supra* note 10, at 72.

[33] *Id.* at 57. In addition, the system held another $5.3 billion in high risk loans requiring extensive servicing as well as an inventory of $1.1 billion worth of property. *Id.*

[34] *Id.* The FCS apparently remains solvent on paper only because, in 1986, Congress allowed it to adopt the fiscally unsound "non-GAAP" (Generally Accepted Accounting Principle) practice of turning its losses into assets and writing them off over twenty years.

[35] H.R. REP. No. 100-295, *supra* note 10, at 57. The Agricultural Credit Act defines a farm bank as a commercial bank with at least 25% of its loans in agriculture. *Id.*

[36] A. Knox, *Forking Out for Exports*, FARM J., Oct. 1987, at 26. For example, the United States sold 150,000 tons of wheat to China at $1.88 per bushel. Exporters, through the Export Enhancement Program (EEP), received an additional 92 cents subsidy per bushel. In effect, approximately one-third of the sale value was due to the subsidy. *Id.*

[37] Welsh, *supra* note 9, at 22. The favorable returns on investments for cropland, due in large part to government programs helping to produce 7 to 10 percent net returns on investments, are bolstering the market. *Id.*

[38] *Buying Land? Consider This . . .*, FARM J., Sept. 1987, at 37. The best strategy is to buy top quality land that can support itself without program payments. *Id.*

Because of these unpredictable economic factors and the widespread purchase of farm land at inflated prices in the late 1970's and early 1980's followed by the disappearance of inflation and the equity it created, attorneys in agricultural areas are increasingly encountering some unique problems in the areas of property and land finance law.

In addition to familiarizing practitioners with the nature of the problem and the principal players involved, this article attempts to provide a brief summary of the law on three interrelated problems: ownership of crops on foreclosed farmland; priority of liens on these crops; and the effect of after-acquired property clauses in bankruptcy. Specifically, this article will identify the various Mississippi and federal statutes involved and briefly explore the operation of those statutes as construed by various commentators and courts in Mississippi and elsewhere. This article does not attempt to provide a "hornbook" treatment of these subjects, but rather provides a summary of the law for those practitioners who may be encountering these mounting farm problems for the first time.

III. The Problem

Against this economic backdrop, consider the following hypothetical which unfortunately is occurring today at an alarming rate:

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[39] Welsh, *supra* note 9, at 22. *Id. See also, Buying Land? Consider This*, *supra* note 38, at 26. (concluding that time to buy land is now while it is priced right and land market prices already reflect factored-down government payments).

[40] Clarion-Ledger (Jackson, Miss.), Jan. 6, 1987, at 8B.

[41] *Buying Land? Consider This*, *supra* note 38, at 37. In addition, when buying land, avoid poor quality land unless it fits your particular investment strategy. For example, one land broker advises: "Buy good ground and you pay for it once - buy poor ground and you pay for it the rest of your life." *Id.*

In January 1987, Richard Roe purchased Black Acre Plantation. He borrowed his purchase money from the Farmers Home Administration (FmHA) and gave FmHA a deed of trust in return.

Roe decides to grow soybeans and cotton and in April of 1987, he borrows the funds necessary to produce his crops from the Production Credit Association (PCA) to be repaid in full no later than January of 1988. He gives PCA a UCC Security Agreement and Financing Statement. His financing statement covers not only his 1987 crops, but it also has an "after acquired-property" clause which grants PCA a security interest in all after-acquired crops or the products or proceeds thereof whenever acquired. The financing statement is properly filed and is effective for five years from the date of filing subject to the right of PCA to render it effective indefinitely by filing a continuation statement every five years.[42]

In January 1988, Roe defaults in the repayment of his loans to FmHA and PCA. Then, in February 1988, Roe files for liquidation under Chapter 7 of the Bankruptcy Code.[43] In April 1988, Roe plants his 1988 crops on Black Acre. In June of 1988, Roe receives his discharge in bankruptcy. Included in his discharge are all debts previously owed to both FmHA and PCA. In July 1988, the Farmers Bank loans Roe funds to be used for the expenses of 1988 crop production. Roe gives the Farmers Bank a UCC Security Agreement and Financing Statement covering his 1988 crops. In August 1988, before the crops are harvested, the trustee forecloses on the Black Acre deed of trust and FmHA buys Black Acre at the foreclosure sale. Notwithstanding the foreclosure, Roe continues to occupy Black Acre and continues to care for and produce his crops.

IV. Ownership of Crops on Foreclosed Land

Who owns the 1988 crop on Black Acre and what are the lien priorities as to this crop? At common law, the mortgagee or beneficiary in a deed of trust, upon foreclosure, became the owner of growing crops. However, crops which were mature and ready to harvest or already harvested belonged to the mortgager or tenant.[44]

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[42] Miss. Code Ann. § 75-9-403(2) (1972). The effectiveness of a filed financing statement lapses on the expiration of the five year period unless a continuation statement is filed prior to the lapse. *Id.*

[43] 11 U.S.C. §§ 701-766, (1982)(outlining liquidation procedures in a chapter 7 bankruptcy).

A procedure that comes into play in this scenario is the common law summary process of forcible entry and detainer, which has been codified in most states, including Mississippi.[45] Actually, Mississippi has two parallel and virtually identical procedures. One procedure has been established for use in justice court[46] and a second for use in county court.[47]

These statutory provisions provide, *inter alia*, that:

> Any . . . mortgagee, or trustee . . . against whom the possession of land is withheld, by his . . . mortgagor, grantor, or other person, after the expiration of his right by contract, express or implied, to hold possession, . . . shall, at any time within one year after such . . . withholding of possession, be entitled to the summary remedy herein prescribed.[48]

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[44] Reiley v. Carter, 75 Miss. 798, 801, 23 So. 435, 436 (1898)(on confirmation of sale in foreclosure, purchaser claimed as absolute owner, and thus had absolute right to all unsevered crops left by defaulting mortgagor); Allen v. Eldering, 22 N.W. 842, 842 (Wis. 1885)(standing oats became property of purchaser of land under foreclosed deed of trust only after such sale was confirmed by the court). Later, by enacting the unlawful entry and detainer statute, the Mississippi Legislature mitigated this earlier common law rule. Under the statute the mortgagor has the right to all crops growing on the property at the commencement of foreclosure proceedings. Miss. Code Ann. § 11-25-25 (1972). The statute also provides that the evicted mortgagor has the right to re-enter the land for the purpose of completing cultivation and removal of his crops. *Id.*; *see also* Garner v. Stuart Co., 222 Miss. 290, 297, 75 So. 2d 747, 749 (1954)(tenant had right after expiration of lease to reasonable time in which to enter land and collect his growing crop); Wood v. Pace, 164 Miss. 187, 198, 143 So. 471, 473 (1932)(defaulting mortgagor could stay and collect his pecan crop where it was cultivated, maintained and fertilized by him, and such crop was still on trees); Upperman v. Littlejohn, 98 Miss. 636, 646, 54 So. 77, 78 (1910)(where tenant leased land for one year, crops grown during that year were vested in tenant, subject to statutory lien of landlord). *See generally* Annotation, *Right to Crops Grown by One Wrongfully in Possession of Land*, 39 A.L.R. 958 (1925)(as supplemented in Annotation, 57 A.L.R. 485 (1928))(discussing cases contemplating ownership of unsevered crops on wrongfully possessed land).

[45] Miss. Code Ann. §§ 11-25-1 to -119 (1972).

[46] Miss. Code Ann. § 11-25-1 to -31 (1972).

[47] Miss. Code Ann. §§ 11-25-101 to -119 (1972).

[48] Miss. Code Ann. §§ 11-25-1 to -101 (1972)(note that both § 11-25-1 and § 11-25-101 of the unlawful entry and detainer statutes contain this same language).

In the event of a judgment for the plaintiff, the court issues a writ of possession to the plaintiff, enforceable by the contempt powers of the court.[49] However, with reference to growing crops, the forcible entry and detainer statutes provides:

> . . . [I]n case of foreclosure of deeds in trust or mortgages, the mortgagor shall be entitled to cultivate and gather the crops, if any, planted by him and grown or growing on the premises at the time of the commencement of the suit; and shall, after eviction therefrom, have the right to enter thereon for the purpose of completing the cultivation and removing the crops, first paying or tendering to the party entitled to the possession a reasonable compensation for the use of the land. The court may, on demand of the defendant, adjudge the sum to be paid or tendered.[50]

While the forcible entry and detainer statutes apply in the case of a grantor under a deed of trust refusing to leave the land after foreclosure and sale by the trustee to a third party,[51] this remedy is available only if the suit is instituted within one year after the right of possession accrues under the trustee's deed,[52] and a defendant who raises this one year statute of limitation as a defense has the burden of proving when his possession became adverse.[53] This statute grants a defendant farmer the right to complete cultivation and removal of his crops provided he first tenders to the plaintiff a reasonable compensation for use of the land. This portion of the statute is remedial and thus should be construed so as to give full effect to its stated purpose.[54] Therefore, the plaintiff is not entitled to both the rental value of the land *and* the profits from the crop.[55] Under section 11-25-115, growing crops are considered personal property and even after being dispossessed by writ of possession, the mortgagor is entitled to a reasonable time within which to go upon the land and gather and remove his crops provided he has made payment of a reasonable rent.[56]

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[49] MISS. CODE ANN. § 11-25-23 to -113 (1972)(parallel provisions).

[50] MISS. CODE ANN. § 11-25-25 to -115 (1972)(parallel provisions). For a more complete discussion of this statutory provision and further case law involving ownership of crops on foreclosed land, see *supra* note 44.

[51] *See* Martin v. Leslie, 229 Miss. 656, 659-60, 91 So. 2d 743, 744 (1957)(where grantors remained in possession of property after foreclosure sale and refused to surrender property to grantee of foreclosure sale purchaser, such grantee was entitled to possession of property and reasonable compensation for its use under forcible entry and detainer statute); *cf.* Garner v. Stuart Co., 222 Miss. 290, 296, 75 So. 2d 747, 748-49 (1954)(grantor entitled to reasonable time to gather growing crop after eviction).

[52] MISS. CODE ANN. §§ 11-25-1 and -101 (1972)(parallel provisions). *See also* Anthony v. Bank of Wiggins, 183 Miss. 885, 892, 173 So. 454, 455 (1937)(mortgagee suit for unlawful entry and detainer dismissed where action was not instituted within one year after right to possession accrued).

[53] Ellis v. Knight, 239 Miss. 836, 838, 124 So. 2d 694, 695 (1960)(defendant claiming that statute of limitations had run on forcibly entry statute has burden of proving when his possession became adverse).

Since this is a summary procedure, a judgment for or against the plaintiff does not bar a later action in the circuit court between the same parties regarding the same land.[57] Likewise, a judgment under the forcible entry and detainer statutes is not res judicata as to a later suit in chancery court to confirm title as against an adverse claimant.[58]

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[54] Miss. Code Ann. §§ 11-25-1 and -101 (1972)(parallel provisions). *See also* Wood v. Pace, 164 Miss. 187, 196, 143 So. 471, 473 (1932)(court recognized remedial purpose of unlawful entry and detainer statute, and liberally construed it to give former tenant possession of pecans still growing on trees); Joiner v. Leflore Grocer Co., 145 Miss. 31, 50-51, 110 So. 857, 860 (1926)(purchaser at foreclosure sale was not entitled to rent due on property leased by tenant, but only reasonable rental for use after foreclosure, with court noting that statute's purpose was remedial); Parks v. Kline, 118 Miss. 119, 125-26, 79 So. 81, 81 (1918)(citing its remedial purpose, court held operation of statute was not confined to only those crops planted by mortgagor, but action could also be brought for reasonable rental against tenant of mortgagor).

[55] Miss. Code Ann. §§ 11-25-21 and -111 (1972)(parallel provisions). *See also* Ellis. v. Knight, 239 Miss. 836, 839, 124 So. 2d 694, 695 (1960)(prevailing plaintiff in unlawful entry and detainer action was not entitled to both rental value and loss of anticipated farming profits); Leavenworth v. Crittenden, 62 Miss. 573, 579 (1885)(purchaser of Mississippi river front property entitled to reasonable compensation for use and occupation of the premises from former owner who refused to vacate).

[56] Garner v. Stewart Co., 222 Miss. 290, 75 So. 2d 747, 749 (1954)(tenant had right after eviction to reasonable time in which to enter land and harvest his growing corn crop).

[57] Miss. Code Ann. § 11-25-119 (1972). *See also* Tate v. Tate, 217 Miss. 734, 736, 64 So. 2d 908, 908 (1953)(court allowed subsequent proceeding in unlawful entry and detainer brought by appellee to obtain possession of house and lot).

[58] Elmer v. Holmes, 189 Miss. 785, 797, 199 So. 84, 87 (1940). In *Elmer*, the appellant claimed title to a beach front house in Biloxi by adverse possession under a parol gift from her father-in-law in 1918. She set up as a defense an earlier decision in an unlawful entry and detainer case favorable to her. *Id.* at 85. Appellee had purchased the house at a foreclosure sale under a deed of trust executed by the heirs of the appellant's father-in-law. *Id.* The Mississippi Supreme Court ruled that an earlier judgment between the same parties, which held that appellee, a foreclosure sale purchaser, was not entitled

If a third party who has purchased the land from a trustee under a deed of trust fails to meet the one year statute of limitations or simply disagrees with a previous judgment on the forcible entry and detainer issue, he may still bring an action for ejectment against the former defaulting owner who refuses to quit the land.[59] Being an action at law, it is normally brought in the circuit court. However, if the defendant (former owner) seeks to raise equitable defenses which could not be raised in a court of law, and there are other errors of jurisdiction, the case may be transferred to the chancery court.[60] The statute of limitation for bringing an action for writ of ejectment is ten years.[61]

When the new landowner pursues an action for ejectment, rather than the unlawful entry and detainer action, the question again arises as to the ownership of crops growing on the land issue. Because the crops were regarded as part and parcel of the realty, the old rule at common law was that one who recovered land in ejectment was entitled to the crops then growing on the recovered land.[62] This has been modified in Mississippi by

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to possession under an unlawful entry and detainer suit, was not a bar to the purchaser maintaining an action to confirm title as against the adverse claimant. *Id.* at 87.

[59] MISS. CODE ANN. §§ 11-19-1 to -105 (1972). *See also* Hytken v. Bianca, 186 Miss. 323, 330 (1939), 186 So. 624, 625 *reh'g granted*, 188 So. 311, 312 (1939)(section of code does not preclude equitable defense to action in ejectment).

[60] Hudson v. Bank of Edwards, 469 So. 2d 1234 (Miss. 1985). In *Hudson*, the Mississippi Supreme Court reversed the circuit court's granting of summary judgment for the appellee bank on grounds that there were material disputed facts before the trial court at the time of decision. *Id.* at 1239. The appellant asserted "fraudulent means" as his sole defense and requested, along with remand, a transfer to chancery from circuit court in order for his equitable defense to be heard. *Id.* The Mississippi Supreme Court, in remanding the case to Chancery, stated that where reversal is appropriate because of other errors independent of jurisdiction, the case should be remanded to the court which is best fitted to administer justice. *Id.* at 1240. *See* Thompson v. First Mississippi National Bank, 427 So. 2d 973, 975-76 (Miss. 1983)(circuit court's transfer of issue of punitive damages to chancery court denied plaintiff opportunity to litigate important substantive right and deprived plaintiff of right to trial by jury which was error other than as to jurisdiction; accordingly, judgment was reversed and case remanded to circuit court for trial on merits).

[61] MISS. CODE ANN. § 15-1-7 (1972).

[62] Carlisle v. Killebrew, 89 Ala. 329, 6 So. 756, 757 (1889). In *Carlisle*, appellant, an ejected farmer, was denied the right to recover for his crops of cotton, corn, and fodder taken by appellee who had recovered the land from the appellant in an earlier ejectment action. *Id.* at 757. *See also* Harrod v. Burke, 87 Kan. 909, 92 P. 1128, 1129 (1907)(at common law, crops growing on land at time of recovery of land through ejectment are

statute:

> If the jury find for the plaintiff in an action of ejectment, and the defendant have a crop then planted and growing upon the premises in question, it shall assess a reasonable rent for the plaintiff to receive for the use of the premises, for such time as it may think necessary for the defendant to make and gather his crop. If the defendant enter into bond with security, to be approved by the court, or by the clerk in vacation, in a penalty of double the amount of rent so assessed, payable to the plaintiff, conditioned for the payment of the rent assessed at the expiration of the term fixed by the jury for the defendant to hold possession of the premises, then a writ of possession shall not issue upon the judgment in the action, until the expiration of the time so allowed by the jury. . . .[63]

Thus, in the hypothetical proposed, the FmHA would, under common law, have owned the growing crops upon foreclosure, but Roe would still have owned any matured or severed crops. However, as modified by Mississippi statute, Roe would actually own *all* the crops, but would be required to pay FmHA a reasonable rental for use of the land. However, since a mortgagor is entitled to possession until foreclosure, the rent would run only from the date of foreclosure and not from the date of default.[64] Roe's crops would still, however, be subject to liens cre-

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regarded as part of realty and pass to plaintiff in absence of evidence showing any right of severance in favor of other party). This rule rests on the proposition that, in law the defendant is regarded as a trespasser, and upon the theory that the crops still standing on the land and affixed to the soil are "part and parcel" of the land and are not personal property, therefore recovery of the land necessarily includes the crops. 21 AM. JUR. 2d *Crops* § 31 (1981).

[63] MISS. CODE ANN. § 11-19-87 (1972).

[64] MISS. CODE ANN. § 89-1-43 (1972). *See* Myers v. Hobbs, 100 F.2d 822, 824 (5th Cir. 1939)(rent not allowed until foreclosure and mortgagee is in rightful possession). *See also* Joiner v. Leflore Grocer Co., 145 Miss. 31, 48, 110 So. 857, 860 (1927)(purchaser at mortgage foreclosure sale is not entitled to rent for use of land prior to foreclosure, but only to reasonable rental for use of land after foreclosure.); Reiley v. Carter, 75 Miss. 798, 804, 23 So. 435, 436 (1898)(on judicial confirmation of foreclosure sale, title to all crops then unsevered passes to purchaser); Kessee v. Sloan, 69 Miss. 369, 370, 11 So. 731, 731 (1892)(purchaser of land at partition sale is entitled to rent falling due after purchase if not expressly reserved); Farmer's Loan & Trust Co. v. Avers, 67 Miss. 208, 7 So. 358, 358 (Miss. 1890)(before foreclosure, mere possession of trustee under deed of trust is insufficient to sustain action for conversion of crude turpentine taken from trees on land before trustee's possession was acquired).

ated by secured crop production loans as will be discussed next.

V. Priority of Crop Liens

Under the common law, crop liens were governed by the law of chattel mortgages. The general chattel mortgage rule was that if a crop mortgage was written to cover the crop year during which the advances were made as well as the following crop year or years (an "after-acquired property" clause), it was only an equitable mortgage as to the future years. Therefore, if the mortgagee refused to make future advances and the tenant mortgaged the later crop to another mortgagee for supplies to make a crop which otherwise would not have been made, then the later mortgage was granted priority.[65] The reason for giving priority to the later mortgage was because:

> . . . . [T]he merchant who furnished the supplies and advances to make the crop under the second deed of trust would have the higher or better equity, in that it was by his help and by his means that the crop was made and without which it might not have been made at all.[66]

Chattel mortgage law has been supplanted by section 9-312(2) of the Uniform Commercial Code, a model provision which is now codified in Mississippi at section 75-9-312(2) of the Mississippi Code. This section states:

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[65] Butler Merchantile Co. v. Cruise, 175 Miss. 200, 207, 166 So. 325, 326 (1936). In *Butler*, the appellee was unable to produce a 1930 crop on his lands without financial help for which he applied to appellant. *Id.* at 325. In return, the appellee executed a mortgage to appellant for all crops to be grown on his lands during 1930 and 1931. *Id.* Appellee had to apply for aid from appellant again in 1931 but was refused because appellant was going out of business. *Id.* Appellee then requested advances from Hymen Merchantile Co. which agreed to loan the appellee the necessary money. *Id.* Subsequently, Hymen Merchantile Co. assigned the indebtedness due it by the appellee to the First National Bank of McComb. *Id.* In determining which party had the rights to the 1931 crop, the Mississippi Supreme Court held that a valid crop mortgage could be given only in the crop grown during the year the advances were made and that if the mortgage purported to cover future crops, it was at most an equitable mortgage good between the parties and did not constitute a valid first lien. *Id.* at 326. *See* Coffey v. Land, 176 Miss. 114, 117, 167 So. 49, 51 (1936)(prior mortgage on crops of future year was only equitable and new mortgage was to be first in priority because without second merchant's financial help crop might never have been produced); Myers v. Hobbs, *supra* note 64, at 823-24 (Farm Credit Administration holding tenant's crop mortgage had priority in proceeds of crops raised by tenant over land mortgagor's claim because had FCA not come to tenant's aid there would have been no crops grown).

[66] *Coffey*, 176 Miss. at 117, 167 So. at 51.

> A perfected security interest in crops for new value given to enable the debtor to produce crops during the production season and given not more than three (3) months before the crops become growing crops by planting or otherwise takes priority over an earlier perfected security interest to the extent that such earlier interest secures obligations due more than six (6) months before the crops become growing crops by planting or otherwise, even though the person giving new value had knowledge of the earlier security interest.[67]

Thus, under section 75-9-312(2), a subsequent perfected security interest in crops takes priority over an earlier perfected security interest, but only if the following conditions are met:

1. The crop production security interest must be taken in exchange for new value;
2. The new value must be given "to enable the debtor to produce the crops during the production season";
3. The new value must be given "not more than three (3) months before the crops become growing crops by planting or otherwise"; and
4. The earlier security interest must be to secure an obligation which is more than six (6) months *overdue* at the time the crops become growing crops.[68]

The web becomes further tangled when future advances are involved. Subject in some cases to the UCC rules governing purchase money security interests and judicial process lien creditors, a creditor with a perfected security interest making a future advance takes priority as to the future advance over a subsequent creditor with a security interest perfected in the interim between the perfection of the first security interest and the future advance.[69] The only way, therefore, that the second creditor can protect itself is to search the UCC records for earlier filings and refuse to make a loan unless the debtor pays off the prior creditor or obtains a subordination agreement.[70] Notice that these UCC crop lien priority rules are the opposite of the law regarding future advances on real property. Under the law of real property in Mississippi, after actual notice of the attaching of a junior lien is provided, a senior mortgagee ordinarily will not be protected in making future advances under his mortgage given to secure such advances unless he was under a binding obligation to make them.[71]

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[67] *Id.* Codified in Mississippi as MISS. CODE ANN. § 75-9-312(2) (1972). *See also* United States v. Minster Farmer's Cooperative Exchange, Inc., 430 F. Supp. 566, 571 (N.D. Ohio 1977)(on action for conversion of crops by defendant, where security interests of both plaintiff and defendant in same after-acquired crops of debtor attached at same time, defendant's security interest was not entitled to priority under U.C.C. § 9-312 (2)).

[68] MISS. CODE ANN. § 75-9-312(2) (1972).

Under the hypothetical proposed, the Farmers Bank meets the first three criteria of section 75-9-312(2). It also appears at first blush to meet the fourth. When it made its 1988 crop production loan in July of 1988, the note to PCA which was payable in January of 1988 was more than six months overdue. The problem is that it was not more than six months overdue at the time the 1988 crop became a "growing crop" in April of 1988. Therefore under the UCC, the Production Credit Association would maintain its first lienholder status as to the 1988 crop based on its "after-acquired property clause." However, as seen in the next section, the bankruptcy would in most circumstances, extinguish PCA's lien as to the 1988 crops.

VI. AFTER-ACQUIRED PROPERTY CLAUSES AND BANKRUPTCY LAW

With certain exceptions, section 552(a) of the Bankruptcy Code provides that property acquired by the debtor or the bankrupt estate after the filing of a petition in bankruptcy is not subject to any lien resulting from an after-acquired property clause in a security agreement entered into before the filing of the petition.[72] Simply stated, this provision nullifies any pre-petition liens to the extent they include any property acquired by the debtor after the filing of bankruptcy. Thus, if a farmer plants his crops before he files bankruptcy, then a perfected security interest, including an after-acquired property clause, would attach to the crops and proceeds of the crops realized post-petition. However, under most circumstances, a pre-petition security interest will not attach to crops planted after the debtor files for bankruptcy.[73] Even though section 552(a), in most circumstances, avoids a pre-petition security interest in property acquired by the debtor after filing bankruptcy, under section 552(b),[74] a creditor generally retains its security interest in post-petition proceeds, products, and offspring of property in which he acquired an interest prior to the commencement of the bankruptcy case.[75] Thus, the question to be answered under section 552(a) is whether the debtor planted his crops before or after filing his petition in bankruptcy. If planted after the bankruptcy petition was filed, then they are not subject to a lien created by a pre-petition after-acquired property clause. If planted before the petition was filed, then they are subject to the pre-petition security interest. The question to be answered under section 552(b) is who has rights in proceeds acquired by the debtor's estate post-petition from the disposition of property acquired pre-petition.[76] In order to prevail under section 552(b), the creditor with a pre-petition security interest must be able to show that proceeds from the sale of pre-petition crops have been used to finance post-petition crops.[77]

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[69] MISS. CODE ANN. § 75-9-312(7) (1972).

[70] MISS. CODE ANN. § 75-9-312(7) (1972). *See also* MISS. CODE ANN. § 75-9-316 (1972)(persons entitled to priority of security interests may agree to subordination).

[71] North v. J.W. McClintock, Inc., 208 Miss. 289, 44 So. 2d 412, 414 (1950). *See also* Ewing v. Krafft Co., 158 A.2d 654, 658 (Md. 1960)(lender subordinated to intervening lienors where lender had actual knowledge of intervening liens when he made additional optional advances); Riggs v. National Bank v. Welsh, 254 A.2d 172, 174 (Md. 1969)(voluntary advances made by senior lienor, with actual knowledge of intervening liens, rank behind those intervening liens); Heller v. Gate City Building and Loan Assoc., 408 P.2d 753, 755 (N.M. 1965)(first mortgagees, with actual knowledge of intervening liens making future optional advances cannot obtain priority for subsequent advances over intervening liens).

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[72] 11 U.S.C. § 552(a) (1976).

[73] *See, e.g., In re* Wallman, 71 Bankr. 125, 127 (Bankr. S.D. 1987)(creditor's otherwise properly perfected pre-petition future crop security interest extinguished regarding crops planted post-petition); *In re* Hardage, 69 Bankr. 681, 685 (Bankr. N.D. Tex. 1987)(crops subject to pre-petition security interest planted prior to commencement of bankruptcy proceeding are subject to attachment under creditor's post-petition liens); Hugo v. United States Farmers Home Admin., 50 Bankr. 963, 967 (Bankr. E.D. Mich. 1985)(discussing 11 U.S.C. § 552 which nullifies pre-petition liens to extent that they include after-acquired property of debtor).

[74] 11 U.S.C. § 552(b) (1976).

[75] *In re* Bohne, 57 Bankr. 461, 463 (Bankr. N.D. 1985). *See also* J. Catton Farms, Inc. v. First Nat'l Bank of Chicago, 779 F.2d 1242, 1246 (7th Cir. 1985)(where bank held perfected security interest which included farmer's crop proceeds, even if acquired after bankruptcy, these should be included as lender's security unless enforcement is deemed inequitable); *In re* Wallman, 71 Bankr. 125, 127 (Bankr. S.D. 1987)(properly perfected pre-petition future crop security interest of Farmers' Home Administration did not attach to crop planted post-petition); *In re* Oliver, 66 Bankr. 426, 428 (Bankr. N.D. Tex. 1986)(creditors entitled to debtor's post-petition rental income for crops grown by third party lessee on leased farmland where creditors possessed secured pre-petition liens); *In re* Pigeon, 49 Bankr. 657, 659 (Bankr. N.D. 1985)(creditors retain under 11 U.S.C. § 552(b) interest in proceeds and property acquired prior to debtors commencement of bankruptcy proceedings).

Even assuming the crop was planted pre-petition and the after-acquired property clause attaches a security interest thereto, if the crop was planted within ninety (90) days of the filing of the bankruptcy, the security interest can be avoided under section 547[78] as a preferential transfer.[79] If a security interest attaches to crops planted pre-petition, the value of the security interest is not cut off by section 552(a) and, therefore, determined as of the date of the filing of the petition in bankruptcy. The value of the security interest is equal to the full value of the harvested crop.[80] However, under section 506(c)[81] of the Bankruptcy Code, the debtor is entitled to deduct the costs of maintaining, harvesting and marketing the crops.[82]

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[76] *In re* Lorenz, 57 Bankr. 734, 736 (Bankr. N.D. Ill. 1986)(bank's security interest did not extend to cash proceeds generated by 1985 crop planted after debtor filed for bankruptcy).

[77] *Hugo*, 50 Bankr. at 967. *See* MISS. CODE ANN. § 75-9-306 (1972)(defining proceeds as receipts received upon sale, exchange, or other disposition of collateral or proceeds).

[78] 11 U.S.C. § 547 (1976). This section updates the preference provisions bringing them into conformity with the Uniform Commercial Code. *Id.* Preferences are described in pertinent part:

> [T]he trustee may avoid any transfer of an interest of the debtor in property - (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt; (3) made while debtor was insolvent; (4) made - (A) on or within 90 days before the date of the filing of the petition . . .; (5) that enables such creditor to receive more than such creditor would receive if (A) the case were a case under chapter 7 of this title; (B) the transfer had not been made; and (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

Id. § 547(b).

[79] *See, e.g., In re* Lemley Estate Business Trust, 65 Bankr. 185, 189-90 (Bankr. N.D. Tex. 1986)(crop planted within 90 day time frame of 11 U.S.C. § 547(b) so FDIC forbidden to recover crop proceeds because recovery would constitute preference under § 547(b)).

[80] *See, e.g., In re* Randall, 58 Bankr. 289, 291 (Bankr. Ill. 1986).

[81] 11 U.S.C. § 506 (1976). The trustee may recover from property securing an allowed secured claim the reasonable necessary costs and expenses of preserving, or dispos-

In the hypothetical proposed, since Roe planted his 1988 crops subsequent to filing his petition in bankruptcy, the after-acquired property clause in PCA's 1987 financing statement does not create a lien in favor of PCA against his 1988 crops. However, if Roe used any proceeds from his 1987 crops to finance his 1988 crops, PCA would have a lien against his 1988 crops to the extent of the 1987 proceeds used.

VII. Conclusion

In today's volatile farm economy, farm failures and bankruptcies are commonplace. Because the law of real property, UCC crop liens, and bankruptcy all apply and may sometimes conflict, the rights of the farmer, land purchase lender, and crop production lender are oftentimes difficult to sort out. The basic rules, however, are that the beneficiary under a foreclosed deed of trust may remove a farmer holding over from the land under either the summary process of forcible entry and detainer or writ of ejectment. Crops growing at the time of ejectment still belong to the farmer and he may re-enter the land to finish cultivation and harvesting of his crops as long as he pays a fair rental (forcible entry and detainer) or posts a bond double the rent (ejectment).

A lender making a loan for crop production should first search the UCC filings and require the farmer either to pay off all earlier crop loans or obtain a subordination agreement. Failing this, the lender should make sure that the loan complies with the requirements of the UCC provisions set out in section 75-9-312(2) of the Mississippi Code. Most importantly, the lender should be aware that his crop production loan will not take priority over an earlier crop production loan with an "after-acquired property" clause unless the earlier loan is at least six months overdue at the time the crops become "growing" crops.

Finally, both lenders and farmers should be aware that a

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ing of such property to the extent of any benefit of the holder of such claim. *Id.* § 506(c).

[82] *Id.*

security interest in crops created by a security agreement with an after-acquired property clause is cut-off by the farmer filing bankruptcy. Thus, if a farmer is contemplating bankruptcy and continued operations afterwards, it would be in his best interest to file bankruptcy first and then plant his crops. If the farmer, however, uses proceeds from a crop harvested prior to filing bankruptcy to finance crops planted after filing bankruptcy, creditors' pre-petition liens will attach to his post-petition crops and proceeds.

1988 MISSISSIPPI SUPREME COURT REVIEW

ADMINISTRATIVE LAW

During 1988, the Mississippi Supreme Court rendered twenty-nine decisions in the area of administrative law. This review, however, will present only those decisions which have either expanded, clarified or changed existing law. Among the topics covered by these decisions but not receiving textual treatment are professional misconduct,[1] employment,[2] taxes,[3] police power,[4] elections,[5] mineral leases,[6] statutes,[7] disability benefits,[8] and actions of various administrative bodies.[9] Cases receiving textual treatment encompass the following areas: workers' compensation, attorney and judicial misconduct, election contests, tax refunds and eminent domain.

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[1] *See* Stewart v. Walls, 534 So. 2d 1033, 1035 (Miss. 1988) (in legal malpractice action, plaintiff must prove that "but for" attorney's negligence, he would have been successful in his earlier action or defense); Jennings v. Mississippi State Bar, 533 So. 2d 443, 444 (Miss. 1988) (burden of proving entitlement to reinstatement from disbarment is on petitioner, who must show rehabilitation and further compliance with jurisdictional requirements of Rule 12 of Rules of Discipline); Mississippi State Bar Ass'n v. Young, 523 So. 2d 323, 324 (Miss. 1988) (where suspended attorney fails to file petition for rehearing and judgment becomes final, subsequent petition to modify order of suspension will be regarded as petition for reinstatement, which under MISS. R. DISCIPLINE 12.4 cannot be filed until after expiration of period of suspension).

[2] *See* City of Jackson v. Froshour, 530 So. 2d 1348, 1355 (Miss. 1988) (order of Civil Service Commission compelling discharge of police officer will be upheld where such determination is supported by substantial evidence); City of Picayune v. Mississippi Employment Sec. Comm'n, 525 So. 2d 1330, 1333 (Miss. 1988) (where employee regularly violates clearly announced and published employment policy, employee is guilty of misconduct as matter of law and is not eligible for unemployment benefits).

[3] *See* McGowan v. Marx, 537 So. 2d 426, 430 (taxpayers involved in business of providing oil field services must include in gross income recovery of cost of personal property used and consumed in providing such taxable service); Morco Industries, Inc. v. City of Long Beach, 530 So. 2d 141, 145 (Miss. 1988) (court held that legislature intended to divest state subdivisions of any authority to tax those entitled to exemption under MISS. CODE ANN. § 57-3-33 (1972)).

[4] *See* Mississippi State Highway Comm'n v. E. F. Hale & Hale Lumber Co., 531 So. 2d 623, 625-26 (Miss. 1988) (Mississippi State Highway Commission has power to make regulations controlling traffic upon and entering highways, including regulation and restriction of private driveways, where such regulations are reasonable and impartial).

I. WORKERS' COMPENSATION

The Mississippi Supreme Court handed down several decisions during 1988 clarifying rights with regard to disability benefits. To begin with, in *Stuart's, Inc. v. Brown*,[10] the Mississippi Supreme Court addressed the issue of whether a pre-existing injury should be taken into consideration in determining benefits awardable to an employee who is injured while on the job.[11] While recognizing that certain pre-

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[5] *See* Rizzo v. Bizzell, 530 So. 2d 121, 126 (Miss. 1988) (although election commissioners sit as advisors in election contests to determine facts, special judge is "controlling judge" of both facts and law); Leigh v. Board of Supervisors, 525 So. 2d 1326, 1328 (Miss. 1988) (propositions to be submitted to voters are not multi-propositional where they relate to only one subject and purpose and therefore fall within the purview of MISS. CODE ANN. § 19-3-55 (1972)).

[6] *See* Wright v. State Oil and Gas Bd., 532 So. 2d 567, 572-74 (Miss. 1988) (drilling units of different depths are considered separate and distinct drilling units even though drilled by same well, such that under MISS. CODE ANN. § 53-3-7(a) (1972), non-consenting owner of leasehold interest is chargeable only for costs of particular unit that is productive).

[7] *See* Grant Center Hospital v. Mississippi Health Care Comm'n, 528 So. 2d 804, 810 (Miss. 1988) (court may examine subsequent legislative amendments to ascertain meaning of prior statute, especially where amendments clarify prior statute in accordance with interpretation and enforcement given it by administrative agency charged with its implementation).

[8] *See* Amoco Production Co. v. Murphy, 528 So. 2d 1123, 1124 (Miss. 1988) (to qualify as employee of subcontractor for purposes of obtaining benefits from contractor under MISS. CODE ANN. § 71-3-7 (1972), subcontractor must be one who contracts to perform act with another who already has obligation to perform such act); Robinson v. Packard Electric Div., 523 So. 2d 329, 332 (Miss. 1988) (Commission's denial of permanent disability benefits must be supported by substantial evidence to be upheld).

[9] *See* Penick v. Mississippi Comm'n on Natural Resources, 533 So. 2d 179, 181 (Miss. 1988) (Environmental Protection Agency regulations require that operator of facility handling hazardous waste obtain permit to operate and permit must be signed by both operator and owner of such facility); South Central Turf, Inc. v. City of Jackson, 526 So. 2d 558, 561 (Miss. 1988) (appeals from decisions of municipal authorities not involving issuance or sale of bonds is within exclusive jurisdiction of circuit court); State *ex rel.* Pittman v. Mississippi Public Serv. Comm'n, 538 So. 2d 387, 399 (Miss. 1989) (Mississippi Public Service Commission's use of company's actual capital structure to arrive at its rate of return was proper where Commission examined and considered testimony of expert witnesses which provided substantial basis for use of such structure).

[10] No. 58,140 (Miss. Dec. 7, 1988).

[11] *Brown*, No. 58,140, slip op. at 1. Nellie W. Brown, an employee of Stuart's, Inc. in

existing disabilities require a reduction of compensation otherwise payable,[12] the court distinguished between occupational and medical (or physical) disabilities and explained that physical disabilities have relevance within the compensation law only insofar as they relate to and cause occupational disability.[13] The court, therefore, concluded that pre-existing physical disabilities generate a duty to apportion only where those physical disabilities have produced in the claimant a pre-existing occupational disability.[14]

The Mississippi Supreme Court in *Fought v. Stuart C. Irby Co.*[15] limited an employee's recovery of benefits with regard to mental injuries. In *Fought*, an employee sought benefits for permanent psychiatric disability allegedly stemming from unrealistic work assignments, unjust pressure and job harassment at her place of employment.[16] In its

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Tupelo, attempted to prevent a shoplifting and was beaten so severely that she was rendered unconscious. *Id.* As a result, Brown became permanently, totally disabled and brought a worker's compensation claim against her employer and its carrier. *Id.* The employer and carrier sought apportionment, arguing that Brown's disability in substantial part was related to pre-existing back trouble and an earlier car wreck. *Id.*

[12] *Id.*, slip op. at 2. *See*, Reichhold Chemical, Inc. v. Sprankle, 503 So. 2d 799, 803 (Miss. 1987) (Commission must apportion injury between pre-existing condition and work-related injury).

[13] *Brown*, No. 58,140, slip op. at 3. *See* Marshall Durbin, Inc. v. Hall, 490 So. 2d 877, 881 (Miss. 1986) (court noted distinction between occupational and physical disabilities and determined that apportionment may not be employed to deprive injured worker of benefits where sole evidence supporting apportionment is that injured worker had pre-existing asymptomatic degenerative condition).

[14] *Brown*, No. 58,140, slip op. at 3. At the hearing before the Worker's Compensation Commission, it was found that Brown's total, permanent disability was solely a result of the job-related injury. *Id.* slip op. at 4. In its opinion, the Mississippi Supreme Court found that, despite evidence that Brown suffered from preexisting physical disabilities, the record supported a finding of fact that Brown had experienced no preexisting occupational disability as she was able to work despite preexisting back troubles until the occurrence of the work-related injury. *Id.* Accordingly, the court determined that the Commission's findings were not clearly erroneous or contrary to the overwhelming weight of the evidence and, therefore, upheld the Commission's order denying apportionment. *Id.*

[15] 523 So. 2d 314 (Miss. 1988).

[16] *Fought*, 523 So. 2d at 316. Elza Fought was employed by the Stuart C. Irby Company to perform certain office-clerical duties in the residential lighting fixtures department in its Vicksburg store. *Id.* at 315. In May 1981, Michael Vail became manager of the Vicksburg store and gave Fought new responsibilities, including assembling and hanging a certain number of fixtures per week, repairing or replacing damaged fixtures and devising a plan to bring up sales or reduce inventory. *Id.* That some month, Fought resigned and on March 8, 1982, filed her motion to controvert seeking benefits for permanent psychiatric disability allegedly caused by stress from her employment. *Id.* at 316. The Workers' Compensation Commission determined that Fought had failed to establish

opinion, the court stated that while under appropriate circumstances an employee can be compensated for mental/nervous injuries not immediately caused by physical trauma,[17] the law does not compensate disability attendant upon the general stress of the work-place.[18] The court concluded that in order for a mental injury unaccompanied by physical trauma to be compensable it must have been caused by something more than ordinary incidents of employment.[19]

Besides limiting benefits available to an injured employee in workers' compensation cases, the Mississippi Supreme Court in *Sturgis v. International Paper Co.*[20] also clarified the limitation placed on the credit available to an employer for wages or compensation paid to an employee during the disability period.[21] The court stated that section 71-3-37 (11) of the Mississippi Code grants an employer credit where such employer has made advance payments of compensation to an injured employee.[22] The court, however, distinguished between compen-

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the requisite work connection between her employment and her disability. *Id.* Instead, the Commission found that Fought's mental disability was attributable to a preexisting personality disorder, which was further exacerbated by severe trauma (alleged molestation of Fought's grandchild) unrelated to her employment. *Id.* at 317. Additionally, the Commission found that the employer's management policy was not unreasonable or unfair. *Id.* The Circuit Court of Warren County affirmed the Commission's findings, and Fought appealed. *Id.*

[17] *Id.* at 318 (citing Brown & Root Construction Co. v. Duckworth, 475 So. 2d 813, 815 (Miss. 1985)).

[18] *Id.* The court explained that benefits may be available only if an employee experiences a series of identifiable and extraordinary stressful work connected incidents. *Id.*

[19] *Id.* at 317. The court determined that the stresses or harassments which Fought complained of were nothing more than ordinary incidents of employment and not unusual or untoward events or occurrences. *Id.* at 318. In addition, the court held that the record supported the Commission's finding that Fought's mental disorder preceded her employment. *Id.* Having found that the Commission's findings were supported by substantial evidence and were not in clear error, the court, therefore, affirmed the Commission's order. *Id.* at 319.

[20] 525 So. 2d 813 (Miss. 1988).

[21] *Sturgis*, 525 So. 2d at 815. Homer Sturgis, an employee of International Paper (IP) was injured on the job on November 6, 1980. *Id.* at 814. From November 6, 1980 until January 20, 1981, IP paid Sturgis compensation benefits of $98.00 per week. *Id.* Sturgis returned to work in February 1981, and worked until February 1982. *Id.* The Workers' Compensation Commission found Sturgis entitled to total disability benefits of $98.00 per week beginning November 6, 1980 and continuing from a period not to exceed 450 weeks with proper credit for wages earned by claimant or compensation paid by the employer during this period. *Id.* On appeal, the Circuit Court of Adams County reversed the order of the Commission, and Sturgis appealed. *Id.*

[22] *Id.* Section 71-3-37 (11) provides that "[i]f the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due." MISS. CODE ANN. § 71-3-37 (11) (Supp.

sation and wages paid,[23] explaining that the amount of credit due an employer is not the amount of wages or earnings paid, but the amount of compensation due for the particular period.[24] The court, therefore, denied an employer credit in excess of the compensation payable to an injured worker.[25]

Finally, in *Griffin v. Futorian*,[26] the Mississippi Supreme Court addressed the issue of when benefits provided by the Workers' Compensation Act shall constitute an injured employee's exclusive remedy against his employer. In *Griffin*, an employee, who had been injured while operating a sawing machine at a furniture plant, brought a tort action against his employer after having received compensation for his injuries under the Workers' Compensation Act.[27] The employee claimed that his injuries constituted a new tort outside the exclusivity rule of the Mississippi Workers' Compensation law found in section 71-3-1 of the Mississippi Code.[28] The court, however, explained that in

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1988).

[23] *Sturgis*, 525 So. 2d at 815. The court explained that compensation is defined in Miss. Code Ann. 71-3-3 (j) (Supp. 1988) as the money allowance payable to an injured worker or his dependents, including funeral benefits. *Sturgis*, 525 So. 2d at 815.

[24] *Sturgis*, 525 So. 2d at 815. The court cited Larson, Workmen's Compensation Law, 57.47 which explains:

> [i]f the wage paid was $200, and if the compensation due for the week was $150, the credit is for $150 only. In other words, the credit is for the week, not for a number of dollars, and the excess cannot be carried over as a credit against other weeks of liability.

Sturgis, 525 So. 2d at 815.

[25] *Sturgis*, 525 So. 2d at 815. Having found that the Commission had substantial evidence to support its factual determination, the Mississippi Supreme Court reversed the circuit court and reinstated the order of the Commission. *Id.* Accordingly, the court determined that the proper credit due IP was $98.00 per week for the number of weeks Sturgis continued to work after his injury and not the total of his earnings for the weeks worked. *Id. See* South Central Bell Telephone Co. v. Aden, 474 So. 2d 584, 596 (Miss. 1985) (court limited credit to amount of compensation payable to injured employee).

[26] 533 So. 2d 461 (Miss. 1988).

[27] *Griffin*, 523 So. 2d at 462. On February 8, 1983, James S. Griffin, an employee of Futorian Corporation in Eupora, Mississippi, slipped on an accumulation of sawdust while operating a large lumber sawing machine and fell into the saw which severed most of his right hand and mangled his right arm. *Id.* Griffin filed for Workers' Compensation benefits and received a lump-sum settlement. *Id.* Several months later, Griffin returned to work and on September 2, 1983, he again slipped on the sawdust and fell into the saw, severely injuring his left hand. *Id.* Griffin again was granted compensation for the injury to his left hand. *Id.* In September 1988, Griffin filed a tort action against Futorian and George Faulk, the corporate manager, for the injuries sustained from both accidents. *Id.*

[28] *Id.* at 463. The Circuit Court of Webster County granted summary judgment in favor of Futorian and Faulk, ruling that Griffin's claim was barred by the exclusivity rule of the Mississippi Worker's Compensation Act in Miss. Code Ann. § 71-3-1 (Supp. 1988).

order for an injured employee to avoid the exclusivity provision two elements must be present: (1) the injury must have been caused by the willful act of another employee acting in the course of employment and in the furtherance of the employee's business, and (2) the injury must be one that is not compensable under the Act.[29] Having found that the employer's actions were not done with an intent to injure the employee[30] and that the injury arose out of and in the course of the employment such that it was compensable under the Act, the court concluded that the employee's exclusive remedy was the benefits provided for under the Workers' Compensation Act.[31]

II. ATTORNEY AND JUDICIAL MISCONDUCT

The Mississippi Supreme Court rendered four significant decisions with regard to disciplinary sanctions for misconduct of attorneys and judges. First, in *Mississippi State Bar v. Edwins*,[32] the court held that under Rule 13 of the Rules of Discipline for the Mississippi State Bar, disciplinary sanctions imposed upon an attorney in another jurisdiction shall be conclusive evidence in Mississippi of the guilt of the unprofessional conduct on which such sanction was ordered.[33] In that

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Griffin, 533 So. 2d at 462. Section 71-3-1 provides in pertinent part:

> The liability of an employer to pay compensation shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependants, next-of-kin, and anyone otherwise entitled to recover damages at common law or otherwise from such employer on account of such injury or death. . . .

MISS. CODE ANN. § 71-3-1 (Supp. 1988).

[29] *Griffin*, 533 So. 2d at 463 (citing Miller v. McRae's Inc., 444 So. 2d 368, 371-72 (Miss. 1984)).

[30] *Griffin*, 533 So. 2d at 464. *See* DUNN, MISSISSIPPI WORKMEN'S COMPENSATION, § 22 (3d ed. 1982 and Supp. 1984) (in order for willful tort to be outside exclusivity of Act, employer's actions must be done with actual intent to injure employee).

[31] *Griffin*, 533 So. 2d at 464. The court also held that George Faulk was acting within the scope of his employment and was, therefore, also immune from suit as the exclusiveness of the Act protected him as well as Futorian. *Id.* Accordingly, the judgment of the lower court was affirmed. *Id.*

[32] 534 So. 2d 218 (Miss. 1988).

[33] *Edwins*, 534 So. 2d at 219. Rule 13 of the Rules of Discipline for the Mississippi State Bar provides:

> When an attorney should be subjected to disciplinary sanctions in another jurisdiction, such sanction shall be grounds for disciplinary action in this state, and certification of such sanction by the appropriate authority of such jurisdiction to the Executive Director of the Bar or to the Court, shall be conclusive evidence of the guilt of the offense or unprofessional conduct on which said sanction was ordered, and it will not be necessary to prove the grounds for

case, the Mississippi State Bar (MSB) brought a formal complaint against Rallie C. Edwins, a Mississippi resident and member of the MSB, based upon unprofessional and unethical conduct occurring in Louisiana for which his license to practice law in that state had been suspended for two years.[34] In holding that the findings of the Supreme Court of Louisiana were conclusive evidence of Edwin's guilt of the offenses charged, the Mississippi Supreme Court stated that the sole issue left for its determination was the extent of the final discipline to be imposed.[35] Although not bound by the Louisiana disposition,[36] the court found Louisiana's action to be persuasive and imposed a like sanction on Edwins of two years suspension from the practice of law in the State of Mississippi.[37]

In *Goeldner v. Mississippi State Bar Association*,[38] the Mississippi Supreme Court expounded upon its ultimate authority in proceedings involving attorney discipline. In *Goeldner*, the Mississippi State Bar Complaint Tribunal had determined that an attorney, Christian T. Goeldner, had fraudulently padded legal time spent working on a case for a client and had willfully misrepresented the amount of fees due.[39] Based on these findings the Tribunal ordered that the attorney

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> such offense in the disciplinary proceedings in this state. The sole issue to be determined in the disciplinary proceeding in this state shall be the extent of the final discipline to be imposed on the attorney, which may be less or more severe than the discipline imposed by the other jurisdiction.

Miss. R. Discipline, Rule 13 (1983).

[34] *Edwins*, 534 So. 2d at 218-19. Edwins had been found guilty in Louisiana of violations of the Rules of Discipline in a matter arising out of his handling of two workers' compensation claims. *Id.* at 219. Edwins' violations involved inaccurate and incomplete accounting of the disbursement of settlement funds, improper accounting of funds, fees charged in excess of the amount permitted under the Worker's Compensation statute, and the commingling of client and personal funds. *Id.* (citing Louisiana State Bar Association v. Edwins, 519 So. 2d 93 (La. 1988)).

[35] *Id.* The court stated that the filing of a certified copy of the final decision of the Supreme Court of Louisiana with the clerk of this court was sufficient to activate Rule 13. *Id.* Additionally, the court determined that Edwins had received full due process in Louisiana. *Id.*

[36] *Id. See* Mississippi State Bar v. Young, 509 So. 2d 210, 219 (Miss. 1987) (Mississippi Supreme Court is not bound by another court's disposition of disciplinary sanctions).

[37] *Edwins*, 534 So. 2d at 220. In deciding on a two year suspension, the court took into consideration the fact that Edwins was not a first offender, but had been suspended in Louisiana for thirty days for making cash advances to a client and for ninety days for soliciting employment. *Id.* at 219 (citing Louisiana State Bar Ass'n v. Edwins, 329 So. 2d 437 (La. 1976); Louisiana State Bar Ass'n v. Edwins, 519 So. 2d 93, 102 n.27 (La. 1988)).

[38] 525 So. 2d 403 (Miss. 1988).

[39] *Goeldner*, 525 So. 2d at 404. Goeldner had been hired by Eugene F. Miller to

be disbarred.[40] In its review of the record, the Mississippi Supreme Court found that the Mississippi State Bar had established by clear and convincing evidence each act of misconduct necessary to support the Tribunal's findings.[41] The court, however, clarified the point that the supreme court is the supreme trier of fact and is not bound by any findings of fact by a Complaint Tribunal, but may review such findings and give them such merit as they may deserve.[42] As to the discipline imposed by the Tribunal, the court further explained that it has independent authority to reassess the punishment imposed in disciplinary proceedings and to modify such as it deems proper.[43] Having found disbarment too severe for the misconduct involved, the court vacated the order of the Tribunal and ordered instead a two year suspension.[44]

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recover assets belonging to Miller's aunt-in-law, Florence Middleton. *Id.* Miller agreed to pay Goeldner at the rate of $100 per hour. *Id.* Goeldner opened a file entitled "Miller Re: Middleton - an estate matter" and assigned the file the number 500-84001. *Id.* Although Goeldner was successful in the suit to recover Mrs. Middleton's assets, Chancellor Dennis Baker reduced Goeldner's fee from the agreed upon $100 per hour to $60 per hour. *Id.* Goeldner then submitted a bill for his legal services for file number 500-84001 which totaled $9,910.32 for work performed at $60 per hour. *Id.* Miller compared some of the bills previously submitted by Goeldner and discovered that although the rate of pay as ordered by the Court was considerably lower, the total of each of the two bills was nearly equal. *Id.* Miller and Chancellor Baker filed complaints with the Mississippi State Bar alleging that Goeldner had padded the time he spent on the Middleton matter. *Id.* Goeldner then presented for the first time an account labeled "Miller Re: Conservatorship," file number 900-84001. *Id.* at 405. The Complaint Tribunal of the Mississippi State Bar determined that Goeldner fabricated the second file and the billing hours in respect thereto. *Id.* at 405.

[40] *Id.* at 406. The Tribunal determined that Goeldner's conduct amounted to a violation of the Disciplinary Rules of the Code of Professional Responsibility of the Mississippi State Bar, including rules DR1-102 (A) (1, 4, 5 and 6), DR2-106(A), and DR7-102(A) (3, 4, 5, and 6). *Goeldner*, 525 So. 2d at 406. In addition, the Tribunal found that Goeldner had violated the duties of an attorney as set forth in MISS. CODE ANN. § 73-3-35 (Supp. 1985). *Goeldner*, 525 So. 2d at 406.

[41] *Goeldner*, 525 So. 2d at 407. The court determined that a careful examination of the two accounts revealed that Goeldner had charged both accounts with the same work. *Id.* at 406.

[42] *Id. See* Myers v. Mississippi State Bar, 480 So. 2d 1080, 1093 (Miss. 1985) (Mississippi Supreme Court is trier of fact in bar disciplinary proceedings and can make findings contrary to those of tribunal). *See also* MISS. CODE ANN. § 73-3-329 (5) (Supp. 1982) (court may review findings of complaint tribunal and may make such findings and render such order as it may find to be appropriate).

[43] *Goeldner*, 525 So. 2d at 407 (citing Vining v. Mississippi State Bar Ass'n, 508 So. 2d 1047 (Miss. 1987)).

[44] *Id.* The court explained that there is no standard as to what punishment a particular misconduct deserves. *Id.* Rather, disciplinary sanctions must be determined on a case-by-case basis. *Id. See* A Mississippi Attorney v. Mississippi State Bar, 453 So. 2d

The Mississippi Supreme Court in *Inquiry Concerning Baker*[45] was called upon for the first time to interpret section 177A of the Mississippi Constitution and Canon 7 of the Code of Judicial Conduct in order to determine when judicial misconduct in violation of such provisions calls for a public reprimand as opposed to a private one. The Mississippi Commission on Judicial Performance (Commission) filed a formal complaint against Chancellor Dennis M. Baker for having telephoned a litigant who was involved in an action pending before the chancellor and for having solicited his political support in an upcoming election.[46] The Commission found by clear and convincing evidence that Baker had violated Mississippi Constitution section 177A and Canon 7 of the Code of Judicial Conduct, and recommended public reprimand.[47] In its review of the case, the Mississippi Supreme Court stated that recent Mississippi judicial disciplinary cases reveal that the sanction of public reprimand is normally imposed only when there has been

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1023, 1028 (Miss. 1984) (court recognized there were no standards for punishment and vacated 45-day suspension and ordered private reprimand).

[45] 535 So. 2d 47 (Miss. 1988).

[46] *Baker*, 535 So. 2d at 48. Judge Baker had presided over the divorce of Judy and John Grantham in September of 1984. *Id.* In March of 1986, John Grantham filed a petition for modification of the divorce settlement, and Judy cross-filed. *Id.* The hearing there-on was orally continued until June 4, after the upcoming judicial election. *Id.* The continued case was not docketed, and the only record of the continuance was the transcript of the record. *Id.* at 49. During the continuance, the judge telephoned Grantham, asking him for his support in the election. *Id.* The judge claimed that he had forgotten about the pending litigation involving Grantham and contended that the impropriety of his action was not willful, but inadvertent. *Id.* at 53. Grantham understood the call to mean that his political support would result in a favorable outcome in the litigation, but no evidence was adduced that the judge ever said that political support would result in a favorable resolution of the case. *Id.* at 52.

[47] *Id.* at 47-48. MISS. CONST. art. VI, § 177A (1979), provides in part: "On recommendation of the commission on judicial performance, the Supreme Court may remove from office, suspend, fine or publicly censure or reprimand any justice or judge of this state for:. . . (e) conduct prejudicial to the administration of justice which brings the judicial office into disrepute. . . ." Canon 7 of the Code of Judicial Conduct of Mississippi Judges provides in part:

> A Judge Should Refrain from Political Activity Inappropriate to His Judicial Office.
>
> B. Campaign Conduct.
>
> (1) A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election;
>
> (a) should maintain the dignity appropriate to judicial office, and should encourage members of his family to adhere to the same standards of political conduct that apply to him;. . .

CODE OF JUDICIAL CONDUCT OF MISS. JUDGES, Cannon 7.

more than one offense.[48] The court could find no case in which one isolated instance of impropriety warranted public censure.[49] Accordingly, the court held that due to the isolated nature of the incident, its inadvertence and the fact that it did not involve moral turpitude, and in light of the judge's long career of public service, a private and not a public reprimand was in order.[50]

Finally, in *Gibson v. Mississippi State Bar*,[51] the Mississippi Supreme Court set forth the procedures to be followed when an attorney seeks reinstatement to practice law following disciplinary sanctions.[52] The court held that Rule 12 of the Rules of Discipline for the Mississippi State Bar controls the procedure of the request for reinstatement.[53] The court, therefore, determined that a tribunal must be convened to conduct a hearing on a petition for reinstatement.[54] In addition, the court declared that the tribunal must follow the procedures, powers and duties of Rule 8 of the Rules of Discipline with the exception that the petition for reinstatement be considered rather than the suspension or disbarment of an attorney.[55] Furthermore, the court stated that at the conclusion of the hearing, the tribunal must report its findings and recommendations for the court's final consideration.[56]

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[48] *Baker*, 535 So. 2d at 53. The court cited thirteen cases in an appendix to this case and concluded from those cases that public reprimand was appropriate only where there has been more than one offense or where there has been more than one violation of the same type of offense. *Id.*

[49] *Id.*

[50] *Id.* at 54. In reaching its decision, the court took into consideration affidavits of the Chancery Clerks of Tate, DeSoto, Panola, Grenada, Yalobusha and Montgomery Counties, all of which attested to Judge Baker's proper conduct of court, professionalism, fairness and efficient handling of heavy caseloads. *Id.* The court stated that while Judge Baker's act of telephoning Grantham while his case was pending was improper, such conduct under the circumstances of this case did not warrant public reprimand according to its interpretation of MISS. CONST. art. VI, § 177A and Cannon 7. *Id.*

[51] 531 So. 2d 800 (Miss. 1988).

[52] *Gibson*, 531 So. 2d at 800. Billy R. Gibson was suspended from the practice of law in Mississippi for six months on July 12, 1985. *Id.* He then transferred to disability inactive status due to a mental illness and excessive consumption of alcoholic beverages. *Id.* In this action, Gibson petitioned the court for reinstatement, claiming that his manic depressive disorder was treatable and that he has effectuated a complete recovery from his problems. *Id.* The Mississippi State Bar filed an answer, asserting that it lacked sufficient information to admit or deny Gibson's allegations of rehabilitation and requested that a Master Tribunal be appointed to hear and consider the issues of reinstatement. *Id.*

[53] *Id.* Rule 12 of the Rules of Discipline for the Mississippi State Bar provides in pertinent part:

> (12.8) Board of Bar Commissioners. Upon receipt of the reinstatement petition, the Court shall allow the Board of Bar Commissioners a reasonable time to conduct an investigation and answer the petition. After filing of pleadings or notice on behalf of the Bar, the proceeding shall continue, if necessary or desirable, as the Court may direct and the Court, in its discretion, may grant or deny the petition as circumstances and justice require.

RULES OF DISCIPLINE FOR THE MISSISSIPPI STATE BAR, Rule 12 (1983).

[54] *Gibson*, 531 So. 2d at 801.

III. Election Contests

In 1988, the Mississippi Supreme Court rendered two significant decisions in the area of election contests. First, in *Foster v. Harden*,[57] the Mississippi Supreme Court overruled prior precedent and held that circuit courts have no subject matter jurisdiction to hear election contests involving candidates' qualifications for service in the legislature.[58] In *Foster*, a duly qualified Democratic candidate for the Mississippi Senate from Hinds County filed a petition to contest the 1987 primary election, claiming that her opposing candidates were not actual residents of the district for two years prior to the election as required by article 4, section 42 of the Mississippi Constitution.[59] The Circuit

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[55] *Id.* Rule 8 of the Rules of Discipline for the Mississippi State Bar provides in pertinent part:

> (a) All formal complaints shall be filed with the clerk of the Court and the Court shall designate a Complaint Tribunal to hear and determine the matter. Hearings before Complaint Tribunals shall be as cases in chancery.
>
> (8.1) Within ten (10) days following the designation of a Complaint Tribunal, the presiding judge shall establish a tentative schedule for discovery, motion hearings and rulings, trial and adjudication, all of which shall be completed within one hundred and eighty (180) days from the date of the designation of the Tribunal, unless extended by the Court on motion of either party for good cause shown.
>
> (8.5) Trials shall be held in the attorney's county of residence; provided, upon written waiver by the attorney or upon motion made by either party and order by the Tribunal, trial may be held elsewhere. The presiding judge or his designee may hear all pre-trial motions and enter all appropriate pre-trial orders. Trial upon the merits shall be held before the full Tribunal. Trials shall be held as expeditiously as possible and the presiding judge may schedule pretrial conferences for all purposes.

Rules of Discipline for the Mississippi State Bar, Rule 8 (1983).

[56] *Gibson*, 531 So. 2d at 801.

[57] 536 So. 2d 905 (Miss. 1988).

[58] *Foster*, 536 So. 2d at 907. The court overruled Gadd v. Thompson, 517 So. 2d 576, 579 (Miss. 1987), which had held that residency qualifications under Miss. Const. art. IV, § 42 were proper subject matter for a special tribunal in an election contest hearing. *Foster*, 536 So. 2d at 907. The court noted that in *Gadd*, the issue of § 38 of the Mississippi Constitution was not raised, nor was the issue of jurisdiction discussed in the majority opinion. *Id.*

[59] *Foster*, 536 So. 2d at 906. Velvelyn B. Foster properly qualified as a Democratic

Court of Hinds County dismissed the petition for lack of subject matter jurisdiction.[60] In its analysis, the Mississippi Supreme Court stated that section 38 of the Mississippi Constitution provides unambiguously that each house of the legislature "shall judge of the qualifications, return and election of its own members."[61] The court explained that each legislative body is the *sole* judge of the elections and qualifications of its members so that the question of a candidate's residency qualifications for the Senate seat under section 42 of the Mississippi Constitution must be determined by the Senate.[62] Recognizing that questions of law are normally only considered in the courts and that section 42 of the Mississippi Constitution is a rule of law, the court, nevertheless, held that judicial competence may not extend to questions of law when the decision of such has been constitutionally placed somewhere else.[63] Having found that section 38 of the Mississippi Constitution vests competence of Senate residency requirements in the Senate itself, the court determined that the judiciary had no subject matter jurisdiction

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candidate for the Mississippi Senate from District 28, Hinds County, for the primary election held on August 4, 1987. *Id.* The Democratic Executive Committee (Committee) certified Earl S. Banks and Alice Hardin as candidates in the run-off election held on August 25, 1987. *Id.* Foster filed a sworn petition with the Committee to contest the election, alleging that Banks and Harden fraudulently qualified to seek election in that said candidates were not actual residents of District 28 for two years prior to the election. *Id.* On August 25, 1987, the Committee certified Harden as the Democratic nominee for the November 3 general election, and unanimously denied Foster's election contest petition. *Id.* Foster then filed a petition for judicial review with the Circuit Court of Hinds County. *Id.*

[60] *Id.* Foster appealed the lower court's adverse determination to the Mississippi Supreme Court. *Id.*

[61] *Id.* Art. IV, § 38 of the Mississippi Constitution provides that "[e]ach house shall elect its own officers, and shall judge of the qualifications, return and election of its own members." MISS. CONST. art. IV, § 38.

[62] *Foster*, 536 So. 2d at 906. The court stated that in the United States and the several states, there is an almost universal doctrine which provides that:

> [e]ach legislative body is the sole judge of the elections, returns and qualifications of its own members, and its action in admitting or expelling a member is not reviewable in the courts. Furthermore, a statute which requires a court to inquire into the commission of corrupt practices in the election of a member of the legislature is not constitutional.

Id. (citing 16 C.J.S., *Constitutional Law* § 201 (1984)).

[63] *Id.* at 907. *See* Dye v. State *ex rel.* Hale, 507 So. 2d 332, 346 (Miss. 1987) (powers of government are separate only insofar as Constitution makes them separate). In a dissenting opinion, Justice Zuccaro argued that § 38 of the Mississippi Constitution establishes a regime of concurrent jurisdiction between the judiciary and the legislature over certain questions of law such as residency requirements under § 42 of the Mississippi Constitution. *Foster*, 536 So. 2d at 908 (Zuccaro, dissenting).

to hear such a case.[64]

In *Breland v. Mallett*,[65] the Mississippi Supreme Court addressed the issue of whether a member of a party executive committee may qualify as a candidate during the term in which he serves as a member of such committee. In *Breland*, a candidate for the August 1987 Democratic party nomination for Supervisor filed an election contest with the Stone County Democratic Party Executive Committee, contending that his opponent had been improperly certified as a candidate because he had actively served as a member of the Executive Committee during the August 1987 elections.[66] After an adverse decision by the Committee, the candidate filed for judicial review in the circuit court of the county.[67] A special tribunal heard the contest and disqualified the opponent, having found that he had actively served as a member of the Executive Committee at all times in question.[68] In its decision, the Mississippi Supreme Court found that under section 25-15-263 of the Mississippi Code, the duties, responsibilities and penalties that apply to the Election Commission equally apply to the Executive Committees of the political parties.[69] The court, therefore, determined that section 25-15-263 incorporates the prohibition of Mississippi Code section 23-15-217, which prevents a member of the Election Commission from being a candidate during the term of his office.[70] Accordingly, the court held that the penalty clause of section 23-15-217 prohibits a member of an executive committee of a political party from being a candidate during the term in which he serves as a member of the committee.[71]

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[64] *Foster*, 536 So. 2d at 907. Accordingly, the court affirmed the judgment of the circuit court. *Id.*

[65] 527 So. 2d 629 (Miss. 1988).

[66] *Breland*, 527 So. 2d at 630. Orbin S. Mallet and John Herman Breland were the two candidates for the August 25, 1987, primary election for the Democratic Party nomination for the office of Supervisor, District 4, Stone County, Mississippi. *Id.* Breland was a member of the Stone County Democratic Party Executive Committee and had tendered a letter to the Committee on July 16, 1987, requesting leave of absence for the period commencing August 1, 1987, and ending October 31, 1987, in order that he might run for the office of Supervisor. *Id.* The canvass of votes in the August 25 election indicated Breland to be the Democratic Party nominee. *Id.* Mallet then filed an election contest with the Committee, asserting that Breland had been improperly certified as a candidate because he was an acting member of the Committee and served as such during the August 1987 elections, attending meetings, assisting in the conduct of the election and handling ballots and election paraphernalia with his own hands. *Id.*

[67] *Id.* The Executive Committee heard the contest, but certified Breland as the Democratic Party nominee. *Id.* On petition to the circuit court, Mallet contended that he should be declared the nominee for the office, or that he should be granted a new primary election. *Id.*

[68] *Id.* The tribunal determined that the document tendered by Breland in support of a leave of absence had no effect due to Breland's conduct in continuing to serve actively on the committee and, thereby, declared Mallet as the Democratic Party nominee. *Id.*

[69] *Id.* at 631. Section 25-15-263, provides in pertinent part that "[t]he county executive committee at primary elections shall discharge the functions imposed upon the county election commissioners. . . and shall be subject to all the penalties to which county election commissioners are subject." MISS. CODE ANN. § 25-15-263 (Supp. 1987).

IV. TAX REFUNDS

One important case receiving review by the Mississippi Supreme Court in the area of use tax refunds was *Weeks Dredging & Contracting, Inc. v. Mississippi State Tax Commission.*[72] Weeks, a New Jersey corporation, which had performed certain dredging work for construction of the Tennessee-Tombigbee Waterway in northeast Mississippi sought a refund of a use tax assessment it had paid to the Mississippi State Tax Commission.[73] The assessment covered the consumption of diesel fuel as a result of the dredging operation in Mississippi.[74] Weeks claimed that because it had paid sales taxes to Alabama on this fuel, which had been shipped to Mississippi from its place of storage in Moundville, Alabama, it was, therefore, entitled to a credit under Mississippi Code section 27-67-7 for the sales taxes paid to Alabama.[75] The court, however, interpreted section 27-67-7 as providing for a credit only where the sales taxes paid in another state are "properly" imposed.[76] The court explained that if credit were allowed for improperly imposed taxes, a company could pay even the most patently improper tax assessments in another state, gain an exemption in Mississippi, and then gain a refund in the taxing state, thereby providing itself with a vehicle to potentially insulate it from all tax liability for such transactions.[77] The court then reviewed the assessment of the Alabama sales tax and determined that under the Alabama Department of Revenue's regulations, the Alabama sales tax was improperly imposed[78] and, moreover, that such sales tax was an impermissible burden on interstate commerce.[79] The court explained that Weeks should have appealed the obviously contradictory administrative determination of the Alabama Department of Revenue and, accordingly, denied Week's request for a refund, concluding that Weeks was not protected where it had paid an improperly assessed sales tax for out-of-state

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[70] *Breland*, 527 So. 2d at 631. Section 23-15-217, provides in part:

> A commissioner of election of any county shall not be a candidate for any office at any election for which he may have been elected or with reference to which he has acted as such; and all votes cast for any such person at such election shall be illegal and shall not be counted. . . .

MISS. CODE ANN. § 23-15-217 (Supp. 1987). *See* Meeks v. Tallahatchie County, 513 So. 2d 563, 568 (Miss. 1987) (election commissioner who resigned as such prior to qualifying for office was disqualified to run for office pursuant to § 23-15-217).

[71] *Breland*, 527 So. 2d at 631. The court stated that the election process must be kept untainted and beyond suspicion. *Id.* The court explained that both sections 23-15-263 and 23-15-217 were enacted to maintain the integrity of the election process and, accordingly, the court affirmed the decision of the Special Tribunal. *Id.*

[72] 521 So. 2d 884 (Miss. 1988).

[73] *Weeks*, 521 So. 2d at 884. Weeks performed dredging work in Mississippi from October 25, 1980, through September 30, 1982. *Id.* at 885.

[74] *Id.* at 884. Weeks ordered the diesel fuel from Chevron, USA, Inc. Chevron produced the fuel at its refinery in Pascagoula, Mississippi and stored it for distribution in Moundville, Alabama. *Id.* at 885. Delivery of the fuel was by common carrier. *Id.* Weeks would pay Chevron according to the invoice issued to the carrier and would also pay the carrier's shipment charges. *Id.* Additionally, Weeks paid the Alabama state and local taxes on the fuel purchases. *Id.*

[75] *Id.* at 887. Section 27-67-7 provides in pertinent part that a use tax will not be

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collected "[o]n the use, storage or consumption of any tangible personal property if the sale thereof. . . has already been included in the measure of a sales tax imposed by another state in which the property was used. . . ." MISS. CODE ANN. § 27-67-7 (Supp. 1987).

[76] *Weeks*, 521 So. 2d at 887. The court determined that the phrase "included in the measure of a sales tax imposed by another state" was sufficiently ambiguous to require some statutory construction. *Id.* The court focused on the term "imposed" and determined that such term fairly implies taxation by authority. *Id. See* BLACK'S LAW DICTIONARY 680 (5th ed. 1979) (impose defined as follows: "to levy or exact as by authority; to lay as a burden, tax, duty or charge"). The court, therefore, concluded that a credit can only be given for sales taxes levied by another state which has the authority to impose such a tax, such that the tax would be properly imposed. *Weeks*, 521 So. 2d at 887.

[77] *Weeks*, 521 So. 2d at 887.

[78] *Id.* at 888. The court cited Rule 114-012 of the Alabama Department of Revenue's regulations which forbids Alabama from imposing a sales tax on transactions involving shipments out of state by the use of common carriers, as such transactions are in interstate commerce and cannot be taxed by the Alabama sales tax law. *Id.*

[79] *Id.* at 890. The court stated that for a tax to withstand commerce clause challenge, it must satisfy the test as found in Complete Auto Transit Co. v. Brady, 430 U.S. 274, 279 (1977), which provides that "(1) the tax must be applied to an activity with a substantial nexus with the taxing state; (2) it must be fairly apportioned; (3) it must not discriminate against interstate commerce, and (4) it must be fairly related to the services provided by the state." *Weeks*, 521 So. 2d at 889. The court found that the first prong of the test was not met because the fuel was produced in Mississippi, the sale was initially negotiated outside of Alabama, and under Alabama law the sale should have been considered a non-taxable event. *Id.* The court explained that the mere changing of possession of the fuel in Alabama did not create a substantial nexus with the State of Alabama. The court then concluded that the failure to meet one prong of the test renders the tax invalid. *Id.* at 890 (citing Marx v. Truck Renting and Leasing Association, 520 So. 2d 1333 (Miss. 1988)).

purchases.[80]

V. Eminent Domain

In *Mississippi State Highway Commission v. Herban*,[81] the Mississippi Supreme Court rendered a significant decision clarifying issues with regard to the clerk's commission in eminent domain cases. Three major issues were addressed: (1) whether the clerk of the circuit court is entitled to a commission in eminent domain proceedings, particularly where the condemning authority has utilized the quick take procedure; (2) whether the clerk's commission should be deducted from the monies handled by him before they are paid to the landowner or whether the commission must be paid by the condemning authority over and above the sums paid into court; and (3) whether the commission is automatically set at one-half of one percent (½ of 1%) of the sums handled by the clerk.[82] As with regard to the first issue, the court explained that under section 27-7-13 of the Mississippi Code, a clerk is entitled to a commission on "all money coming into his hands."[83] The court found no exceptions to the word "all."[84] In addition, the court reasoned that under Mississippi Code section 9-7-121, the clerk would be liable on his bond were any loss to occur in the handling of eminent domain funds.[85] Based on these considerations, the court held that the clerk was entitled to the statutory commission on sums deposited in eminent domain proceedings.[86]

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[80] *Weeks*, 521 So. 2d at 889-90. The court found no reversible error in the record and, accordingly, affirmed the chancery court's judgment denying Weeks a refund. *Id.* at 890.

[81] 522 So. 2d 210 (Miss. 1988).

[82] *Herban*, 522 So. 2d at 211, 213. In *Herban*, the Mississippi State Highway Commission (MSHC), as condemning authority, initiated eminent domain proceedings with regard to a parcel of property located in Lowndes County. *Id.* at 211. Utilizing the quick take procedure as authorized by Miss. Code Ann. § 11-27-85 (Supp. 1987), MSHC deposited a substantial sum of money with the circuit clerk and took immediate possession of the property. *Id.* The Circuit Court of Lowndes County dismissed the case on the grounds that the case had been fully settled and further ordered that MSHC pay the clerk's commission of one-half of one percent of the sum deposited. *Id.* MSHC appealed, claiming that the clerk was not entitled to a commission in eminent domain proceedings. *Id.*

[83] *Id.* at 213. Section 25-7-13(5) provides that "[t]he clerk of the circuit court may retain as his commission on all money coming into his hands, by law or order of the court, a sum to be fixed by the court not exceeding one-half of one percent (½ of 1%) on all such sums." Miss. Code Ann. § 25-7-13(5) (Supp. 1987).

[84] *Herban*, 522 So. 2d at 213.

[85] *Id.* at 212. The court explained that in eminent domain cases, the circuit clerk receives, handles and disburses substantial sums of money and is also accountable for these funds. *Id.* In addition, the court stated that the clerk's bond under Miss. Code Ann. § 9-7-121 (Supp. 1987), covers all monies coming into the hands of the clerk, in-

As to the second issue, the court determined that the clerk's commission must be paid by the condemning authority, over and above the sums paid into court under sections 11-27-27 and 11-27-85.[87] The court explained that a landowner has a constitutional right to "due compensation" under article 3, section 17 of the Mississippi Constitution and, therefore, the landowner may not constitutionally be assessed with costs in an eminent domain proceeding in such a manner that diminishes his compensation received.[88] Moreover, the court held that the statutory mandate in section 11-27-27 of the Mississippi Code requires that the condemning authority "shall pay the costs of the court."[89]

Finally, as to the amount of the commission to be awarded, the court held that under the plain language of section 25-7-13(5), the amount of the commission is to be determined by the court and is not to exceed one-half of one percent (½ of 1%).[90] The court explained

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cluding money deposited when the quick take procedure is utilized. *Id.* Section 9-7-121 provides in part:

> The clerk of the circuit court, before he enters upon the duties of the office, shall take the oath of office, and give bond. . . And he may be required to give additional bond from time to time, for the faithful application of all moneys coming into his hands by law or order of the court; but such additional bonds shall be cumulative security, and the original bond shall likewise cover all monies coming into the hands of the clerk by law or order of the court.

Miss. Code Ann. § 9-7-121 (Supp. 1987).

[86] *Herban*, 522 So. 2d at 213.

[87] *Id.* The court recognized that Miss. Code Ann. § 25-7-13(5) uses the word "retain" and that the word connotes a process whereby the clerk deducts his commission before paying the monies to the landowner. *Id.* However, the court stated that such a wooden reading of the word "retain" would defeat the clerk's commission, and there is no indication in the law that this ought to be done. *Id.*

[88] *Id. See* Pearl River Valley Water Supply Dist. v. Brown, 184 So. 2d 407, 408-09 (Miss. 1966) (landowner may not be subjected to diminution of full measure of due compensation by liability as to any part of cost incurred); State Highway Commission v. Mason, 6 So. 2d 468, 469 (Miss. 1942) (same).

[89] *Herban*, 522 So. 2d at 213. Section § 11-27-27 provides in part:

> Upon the return of the verdict and entry of the judgment, the applicant shall pay to the defendants, or to the clerk if the defendants absent themselves, the difference between the judgment and the deposits previously made, if any; shall pay the costs of court, including the cost of jury service as is otherwise provided by law for the court in which the case is tried.

Miss. Code Ann. § 11-27-27 (1972).

[90] *Herban*, 552 So. 2d at 213. Section 25-7-13(5) expressly provides the clerk's commission shall be "a sum to be fixed by the court not exceeding one half of one percent on all such sums." Miss. Code Ann. § 25-7-13(5) (Supp. 1987).

that the amount of commission is not automatically set at one-half of one percent, but is within the courts considerable discretion, and may range from a nominal commission up to an amount equalling, but not exceeding, one-half of one percent.[91]

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[91] *Herban*, 522 So. 2d at 213. The court affirmed the circuit court's decision to award a commission, but vacated the amount of the commission which was set at one-half of one percent. *Id.* at 213-14. The court remanded to the circuit court with instructions that a commission be fixed in an amount consistent with the court's interpretation of MISS. CODE ANN. § 25-7-13(5). *Id.* at 214.

CIVIL PROCEDURE

The 1988 Mississippi Supreme Court addressed a diverse range of civil procedure issues, including additur,[1] affirmative defenses,[2] appeals,[3] attachment,[4] choice of law,[5] collateral estoppel and res judicata,[6] costs,[7] damages,[8] declaratory actions,[9] discovery,[10] dismissals,[11] due process,[12] election contests,[13] experts,[14] forum non conveniens,[15] full faith and credit,[16] garnishment,[17] grand jury witness testimony,[18]

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[1] State Highway Comm'n of Miss. v. Warren, 530 So. 2d 704, 707 (Miss. 1988) (unless jury's verdict is either so shocking to conscience that it indicates bias, passion and prejudice, or contrary to overwhelming weight of evidence, granting of new trial upon rejection of additur is abuse of discretion).

[2] Wholey v. Cal-Maine Foods, Inc., 530 So. 2d 136, 138 (Miss. 1988) (affirmative defenses are waived unless plead or tried by consent); Gulf City Fisheries, Inc. v. Bobby Kitchens, Inc., 518 So. 2d 661, 663-64 (Miss. 1988) (affirmative defenses require response in denial or avoidance and absent such response issue or issues may be disposed of prior to trial). The court in *Gulf City Fisheries* did not apply the Mississippi Rules of Civil Procedure because both parties agreed that they were inapplicable since the case predated their adoption. *Id.* at 663. Instead, the court applied MISS. CODE ANN. § 11-7-59 (1972). *Gulf City Fisheries*, 518 So. 2d at 663. This code section was supplanted by the adoption of the Mississippi Rules of Civil Procedure in 1982. *See* MISS.R.CIV.P. 81(d).

[3] *In re* Newsom, 536 So. 2d 1, 2 (Miss. 1988) (estimated guardian ad litem's fee is not required to be paid prior to securing appeal); Cunningham v. Mitchell, 535 So. 2d 589, 592 (Miss. 1988) (notice of appeals by infants must be filed within two (2) years of entry of judgment or order); H & W Transfer & Cartage Serv. v. Griffin, 534 So. 2d 216, 217 (Miss. 1988) (affirmance of trial court's denial of Rule 60(b) motion to vacate judgment is equivilent to affirmance of judgment and appellee is entitiled to recovery of 15% statutory damage penalty; additionally, Mississippi Supreme Court Rules are amended to require that motions to correct mandate must be filed within fourteen (14) days after Court has issued mandate or any addition to it).

[4] Anderson v. Sonat, 523 So. 2d 1024, 1027-28 (Miss. 1988) (affidavit in support of petition for attachment must include reasons why complaintant's ability to recover his claim may be lost if attachment is not issued and statement of amount sought; additionally, strict compliance with statutory procedures is required to employ attachment or garnishment because such proceedings are in derogation of common law).

[5] Anderson v. Sonat, 523 So. 2d 1024, 1027 (Miss. 1988) (where suit involves document which affects land in another state, law of that state may control under "center of gravity" test).

[6] Wholey v. Cal-Maine Foods, Inc., 530 So. 2d 136, 139 (Miss. 1988) (res judicata must be affirmatively plead and may not be raised by court upon its own motion); Lee v. Swain Bldg. Materials Co. of New Orleans, Inc., 529 So. 2d 188, 190 (Miss. 1988) (dismissal in another state for expiration of statute of limitations is not adjudication on merits and not res judicata); Weaver v. City of Pascagoula, 527 So. 2d 651, 652-54 (Miss. 1988) (doctrine of collateral estoppel is inapplicable against party who was neither party nor in privity with party in prior action).

[7] *In re* Newsom, 536 So. 2d 1, 2 (Miss. 1988) (estimated guardian ad litem's fee is not required to be paid prior to securing appeal); H & W Transfer & Cartage Serv. v.

Griffin, 534 So. 2d 216, 217 (Miss. 1988) (affirmance of trial court's denial of Rule 60(b) motion to vacate judgment is equivilent to affirmance of judgment and appellee is entitiled to recovery of 15% statutory damage penalty).

[8] Whittley v. City of Meridian, 530 So. 2d 1341, 1346 (Miss. 1988) (jury may no longer be informed of amount of settlement by co-defendant or joint-tortfeasor; trial judge shall reduce any amount awarded by jury by present value of settlement).

[9] Johnson v. Hinds County, 524 So. 2d 947, 953-54 (Miss. 1988) (county is an "interested party" and has standing to seek declaratory judgment that lot owners are required to permit land developer to make improvements required by county subdivision ordinances).

[10] State Highway Comm'n v. Culpepper, 536 So. 2d 18, 19-20 (Miss. 1988) (discovery provisions of Mississippi Rules of Civil Procedure are applicable to eminent domain proceedings, absent procedural statute to contrary; jury verdict cannot stand where discovery is unduly restricted); Hudspeth v. State Highway Comm'n, 534 So. 2d 210, 214-15 (Miss. 1988) (discovery provisions of Mississippi Rules of Civil Procedure are applicable to eminent domain proceedings, absent procedural statute to contrary; jury verdict will not stand where discovery is unduly restricted).

[11] Bolls v. Harris, 528 So. 2d 1128, 1129 (Miss. 1988) (motion for voluntary dismissal without prejudice may not be granted without giving defendant or defendants five (5) days notice and hearing); Comet Delta, Inc. v. Pate Stevedore Co. of Pascagoula, Inc., 521 So. 2d 857, 860-61 (Miss. 1988) (to withstand motion to dismiss for failure to state cause of action complaint need only contain allegations from which elements of cause of action may be inferred).

[12] Evanish v. Berry, 536 So. 2d 7, 8-9 (Miss. 1988) (disciplinary actions of incorporated private social clubs are not subject to due process standards).

[13] Foster v. Harden, 536 So. 2d 905, 907 (Miss. 1988) (circuit courts do not have subject matter jurisdiction over questions concerning status of candidate's residency);Rizzo v. Bizzell, 530 So. 2d 121, 126 (Miss. 1988) (although Code section allows Supreme Court to review election contest hearing and make independant findings of fact, Court will defer to special judge's findings even where majority of county commissioners dissented from such findings).

[14] Hudspeth v. State Highway Comm'n, 534 So. 2d 210, 213 (Miss. 1988) (Mississippi Rules of Evidence are amended to provide that court appointed appraisers are incompetent to testify in eminent domain trials).

[15] Shewbrooks v. A.C. and S., Inc., 529 So. 2d 557, 562 (Miss. 1988) (doctrine of forum non conveniens will not be applied to causes of action which may not be maintained in any other forum because of statutes of limitations, unless defendant agrees to waive statute of limitations defense). For a detailed analysis of Shewbrooks v. A.C. and S., Inc., see 1987 Mississippi Supreme Court Reveiw - Civil Procedure, 57 MISS.L.J. 443, 460-66 (1987). However, the 1989 Mississippi legislature amended Mississippi Code section 15-1-65 to provie that causes of action which arise outside Mississippi may not be maintained in Mississippi if they are barred by a statute of limitation in the place where the cause of action arose, unless the plaintiff is a Mississippi resident. H.B. 1171, Reg. Sess., Miss. Leg. 1989.

[16] Lee v. Swain Bldg. Materials Co. of New Orleans, Inc., 529 So. 2d 188, 190 (Miss. 1988) (dismissal in another state for expiration of statute of limitations is not adjudica-

injunctions,[19] interlocutory appeals,[20] jurisdiction,[21] mandates,[22] motions in limine,[23] post-trial motions,[24] presumptions,[25] punitive damages,[26] relief from judgments,[27] remittitur,[28] the scope of judicial in-

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tion on merits and thus is not entitled to full faith and credit).

[17] Anderson v. Sonat, 523 So. 2d 1024, 1028 (Miss. 1988) (strict compliance with statutory procedures is required to employ attachment or garnishment because such proceedings are in derogation of common law).

[18] *In re* Knapp, 536 So. 2d 1330, 1331-32 (Miss. 1988)(statute which prohibits grand jury witnesses from disclosing contesnts of their testimony does not preclude witness from answering dispositive questions which relate to the same subject matter).

[19] Ray v. Snow, 525 So. 2d 394, 395-96 (Miss. 1988) (party claiming damages under injunction bond must file written suggestion of damages with motion to dissolve injunction or pursue separate cause of action).

[20] American Elec. v. Singarayar, 530 So. 2d 1319, 1323 (Miss. 1988) (interlocutory appeals should not be granted where legal standards are not subject to dispute, unless application of legal standards to facts in specific case is so difficult as to make case substantially equivalent to one in which legal standards are subject to dispute).

[21] Blackledge v. Scott, 530 So. 2d 1363, 1365-66 (Miss. 1988) (state constitution precludes reversal soley on grounds of lack of subject matter jurisdiction); Wilkinson v. Mercantile Natl. Bank at Dallas, 529 So. 2d 616, 618-20 (Miss. 1988) (any national banking association which invests funds in Mississippi may sue or be sued in Mississippi in actions relating to such investments); Anderson v. Sonat, 523 So. 2d 1024, 1027 (Miss. 1988) (executing legal document and having it notarized in Mississippi satisfies both statutory and constitutional requirements for personal jurisdiction in suit arising out of document; additionally, where suit involves document which affects land in another state, subject matter jurisdiction is proper where action is for cancellation or reformation of document and not suit to try title).

[22] H & W Transfer and Cartage Serv., Inc. v. Griffin, 534 So..2d 216, 217 (Miss. 1988) (Mississippi Supreme Court Rules are amended to require that motions to correct mandate must be filed within fourteen (14) days after court has issued mandate or any addition to it).

[23] Whittley v. City of Meridian, 530 So. 2d 1341, 1344 (Miss. 1988) (motions in limine should only be granted where evidence is inadmissible under rules of evidence and mere reference to evidence will tend to prejudice jury against movant).

[24] Telford v. Aloway, 530 So. 2d 179, 181 (Miss. 1988) (trial judges have no discretion to enlarge time period for post-trial motions; all post-trial motions must be made within ten-day time period set forth in Miss.R.Civ.P. 59(b)).

[25] Luter v. Oakhurst Assoc., Ltd., 529 So. 2d 889, 894 (Miss. 1988) (offical acts of municipal corporation are presumed to be valid; to challenge regularity of such acts it must be affirmatively demonstrated that formalities were not met).

[26] Whittington v. Whittington, 535 So. 2d 573, 584 (Miss. 1988) (in order for punitive damages to be assessed against defendant, evidence as to defendant's "net worth" must be presented; evidence of assets alone will not suffice).

[27] Accredited Sur. and Casualty Co., Inc. v. Bolles, 535 So. 2d 56, 59 (Miss. 1988) (Rule 60(b) motions should only be granted upon showing of "exceptional circumstances;" gross negligence, ignorance of rules, ignorance of law, or carelessness on part of attorney will not provide sufficient grounds for relief); H & W Transfer & Cartage Serv. v. Griffin, 534 So. 2d 216, 217 (Miss. 1988) (affirmance of trial court's denial of Rule

quiry into disciplinary actions of private clubs,[29] settlements,[30] service of process,[31] service by publication,[32] standing,[33] statutes of limitation,[34] summary judgment,[35] and venue.[36] Cases receiving textual dis-

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60(b) motion to vacate judgment is equivilent to affirmance of judgment and appellee is entitiled to recovery of 15% statutory damage penalty).

[28] Dorrill v. State Highway Comm'n of Miss., 525 So. 2d 1333, 1335 (Miss. 1988) (unless jury's verdict is either so shocking to conscience that it indicates bias, passion and prejudice, or contrary to overwhelming weight of evidence, granting of new trial upon rejection of remittitur is abuse of discretion).

[29] Evanish v. Berry, 536 So. 2d 7, 8-9 (Miss. 1988) (disciplinary actions of incorporated private social clubs are not subject to due process standards; judicial inquiry into such actions is limited to determining whether club acted in good faith under by-laws adopted by it).

[30] Whittley v. City of Meridian, 530 So. 2d 1341, 1346 (Miss. 1988) (jury may no longer be informed of amount of settlement by co-defendant or joint-tortfeasor; trial judge shall reduce any amount awarded by jury by present value of settlement).

[31] Public Employees' Retirement Sys. of Miss. v. Dillon, 538 So. 2d 327, 328-29 (Miss. 1988)(Public Employee's Retirement System is "domestic corporation"; service of process upon agent for System was sufficient.

[32] Caldwell v. Caldwell, 533 So. 2d 413, 417 (Miss. 1988) (diligent search and inquiry to determine address of defendant must be made before summons by publication may be used).

[33] Luter v. Oakhurst Assoc., Ltd., 529 So. 2d 889, 892 (Miss. 1988) (property owners had standing to appeal decision in zoning dispute adverse to city where city choose not to appeal decision); Johnson v. Hinds County, 524 So. 2d 947, 953-54 (Miss. 1988) (county is "interested party" and has standing to seek declaratory judgment that lot owners are required to permit land developer to make improvements required by county subdivision ordinances).

[34] Wholey v. Cal-Maine Foods, Inc., 530 So. 2d 136, 139-40 (Miss. 1988) (where limited partners' brought suit against general managing partner for breach of fiduciary duties, action was purely equitable because breach gave rise to imposition of implied trust and therefore action was controlled by ten-year statute of limitations rather than general six-year statute of limitations); Lee v. Swain Bldg. Materials Co. of New Orleans, 529 So. 2d 188, 190 (Miss. 1988) (Mississippi statute of limitations applied where Louisiana residents were injured in Louisiana and brought suit against corporation organized under Mississippi law with its principle place of business in Louisiana; additionally, dismissal in another state for expiration of statute of limitations is not adjudication on merits and thus is not entitled to full faith and credit); Shewbrooks v. A.C. and S., Inc., 529 So. 2d 557, 566-67 (Miss. 1988) (Mississippi's statutes of limitations apply to all suits filed in Mississippi, even in cases where cause of action accrued in another state). For a detailed analysis of Shewbrooks v. A.C. and S., Inc., see *1987 Mississippi Supreme Court Review - Civil Procedure*, 57 MISS. L. J. 443, 460-66 (1987). However, the 1989 Mississippi Legislature amended Mississippi Code Annotated section 15-1-65 to provide that causes of action which arise outside Mississippi may not be maintained in Mississippi if they are barred by a statute of limitation in the place where the cause of action arose, unless the plaintiff is a Mississippi resident. H.B. 1171, Reg. Sess., Miss. Leg. 1989; Reich v. Jesco, Inc., 526 So. 2d 550, 552 (Miss. 1988) (to establish fraudulent concealment such as will toll statute of limitations, there must be some act of affirmative nature to prevent discov-

cussion confront the issues of when a motion in limine should be granted,[37] whether court-appointed appraisers in eminent domain cases are competent to be witnesses,[38] the time in which a motion to amend a mandate must be filed,[39] the statutory and constitutional limits of personal jurisdiction,[40] whether trial judges have the discretion to enlarge the time period for post-trial motions,[41] whether a judge may raise the issue of res judicata upon his or her own motion,[42] whether a dismissal in another state for expiration of the statute of limitations is entitled to full faith and credit[43] and whether the jury should be informed of the amount of a joint tortfeasor's or co-defendant's settlement with the plaintiff.[44]

I. PROMGULATION OF NEW PROCEDURAL RULES

Utilizing its inherent power to establish rules governing trial procedure,[45] the 1988 Mississippi Supreme Court amended three procedural rules in *H & W Transfer & Cartage Service, Inc. v. Griffin*[46] and *Hudspeth v. State Highway Commission.*[47]

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ery of claim).

[35] Reich v. Jesco, Inc., 526 So. 2d 550, 552 (Miss. 1988) (party opposing motion for summary judgment must present probative evidence demostrating existence of triable issue of fact; mere allegations will not suffice); Magnolia Constr. Co. Inc., v. Miss. Gulf S. Eng's, Inc., 518 So. 2d 1194, 1199-98 (Miss. 1988) (genuine issues of material fact exist and preclude summary judgment where contract is ambiguous).

[36] Blackledge v. Scott, 530 So. 2d 1363, 1365-66 (Miss. 1988) (if venue is proper as to one defendant, it is proper as to all defendants even though defendant upon whom venue is based is later dismissed from suit, unless original joinder of defendant upon whom venue is based amounted to fraud).

[37] Whittley v. City of Meridian, 530 So. 2d 1341 (Miss. 1988).

[38] Hudspeth v. State Highway Comm'n, 534 So. 2d 210 (Miss. 1988).

[39] H & W Transfer and Cartage Serv., Inc. v. Griffin, 534 So.2d 216 (Miss. 1988).

[40] Anderson v. Sonat, 523 So. 2d 1024 (Miss. 1988); Wilkinson v. Mercantile Nat'l Bank at Dallas, 529 So. 2d 616 (Miss. 1988).

[41] Telford v. Aloway, 530 So. 2d 179 (Miss. 1988).

[42] Wholey v. Cal-Maine Foods, Inc., 530 So. 2d 136 (Miss. 1988).

[43] Lee v. Swain Bldg. Materials Co. of New Orleans, Inc., 529 So. 2d 188 (Miss. 1988).

[44] Whittley v. City of Meridian, 530 So. 2d 1341 (Miss. 1988).

[45] Newell v. State, 308 So. 2d 71, 76-77 (Miss. 1975).

[46] 534 So. 2d 216 (Miss. 1988).

[47] 534 So. 2d 210 (Miss. 1988).

A. *New Mississippi Supreme Court Rule 41(d): Motion to Amend or Correct Mandate*

In *H & W Transfer & Cartage Service, Inc. v. Griffin,*[48] the Supreme Court amended Mississippi Supreme Court Rule 41[49] to provide that motions to amend or correct a mandate must be filed within fourteen (14) days after the mandate has been issued or amended by the court.[50] The court orginally entered its mandate in *Griffin* on July 24, 1987.[51] However, 343 days later, on July 1, 1988, Griffin moved to amend the mandate to include the fifteen percent (15%) statutory penalty imposed by section 11-3-23 of the Mississippi Code.[52]

Concluding that Griffin was entitled to recover the statutory penalty,[53] the court addressed H & W Transfer's argument that the motion should be denied as untimely.[54] Despite the lengthy delay, the court held that since H & W Transfer had not attempted to show prejudice,[55] they had no authority to deny the motion.[56] However, noting that the absence of a time limit upon such motions was in fact a "glitch," the court observed that there should be a "reasonable time limit."[57] Therefore, the court amended Mississippi Supreme Court Rule 41 by adding section (d) to provide that motions to amend or correct a mandate must be filed within fourteen (14) days after the mandate has been issued or amended by the court.[58]

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[48] *Griffin,* 534 So. 2d at 216.

[49] *Id.* at 218. Rule 41 concerns the issuance of mandates. MISS. SUP. CT. R. 41 (1988).

[50] *Griffin,* 534 So. 2d at 218.

[51] *Id.* at 217.

[52] *Id.* Section 11-3-23, in pertinent part, provides:

> In case the judgment or decree of the court below be affirmed,. . .the Supreme Court shall render judgment against the appellant for damages, at the rate of fifteen percent (15%), as follows: If the judgment or decree be for a sum of money, the damages shall be upon such sum.

MISS. CODE ANN. § 11-3-23 (Supp. 1988).

[53] *Griffin,* 534 So. 2d at 217. In *Griffin,* the Mississippi Supreme Court affirmed the trial court's denial of the defendant's motion under Rule 60(b) to vacate or set aside the judgement. *Griffin,* 534 So. 2d at 217. However, the court reasoned that such an affirmance was the equivalent of the affirmance of a judgment. *Id.* Therefore, the court held that Griffin was entitled to recover the 15% statutory damage penalty. *Id.*

[54] *Id.*

[55] *Id.* The court commented that they were only "favored" with the conclusory allegation that the delay was "unreasonable." *Id.*

[56] *Id.* Although acknowledging that the delay was "unusual," the court explained that the current rules placed no time limit upon the filing of such motions. *Id.*

[57] *Id.* at 218.

[58] *Id.* The court chose a fourteen day period by analogizing motions to amend a mandate to motions to retax costs, which must be made within fourteen days under

B. New Provisions in the Mississippi Rules of Evidence

The Mississippi Supreme Court added two new provisions to the Mississippi Rules of Evidence in *Hudspeth v. State Highway Commission.*[59]

During the course of an eminent domain trial in Leake County, the landowner (Hudspeth) attempted to call the court appointed appraiser[60] as a witness.[61] However, the trial judge refused to allow Hudspeth's request because of section 11-27-89 of the Mississippi Code, which renders court appointed appraisers incompetent to testify in eminent domain proceedings.[62]

On appeal, Hudspeth argued that Rule 601[63] of the recently adopted Mississippi Rules of Evidence,[64] which contains no provision rendering court appointed appraisers incompetent, controlled the competency of witnesses and not section 11-27-89 of the Mississippi Code.[65]

Although the case was reversed and remanded on other grounds,[66] the court found no merit in Huspeth's assignment of error regarding

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Miss. Sup. Ct. Rule 36(d). *Griffin*, 534 So. 2d at 218. The court stated that a new subsection (d) shall read: "(d) *Motion To Amend or Correct Mandate; Time For Filing.* Any motion to amend or correct the mandate may be filed within fourteen (14) days after the court has issued the mandate or any addition to the mandate."
Griffin, 534 So. 2d at 218.

[59] 534 So. 2d 210 (Miss. 1988).

[60] *Hudspeth*, 534 So. 2d at 212. The statute which creates the court appointed appraiser is known as the "quick take" statute. *Id.* at 213 (citing Miss. Code Ann. § 11-27-89 (Supp. 1988)). It was designed to enable the Highway Commission to aquire land needed for highway programs as quickly as possible, while protecting the interests of the landowners. *Id.* The court appointed appraiser's valuation of the compensation and damage award is used to determine the amount which the Commission must deposit with the court and "quickly take" the land or right of way. *Id.*

[61] *Id.* at 212.

[62] *Id.*

[63] *Id.* Rule 601 states: "Every person is competent to be a witness except as restricted by Miss. Code Ann. § 13-1-5 (competency of spouses) and § 13-1-11 (persons convicted of perjury or subordination of perjury), or by these rules." Miss. R. Evid. 601 (1988).

[64] *Hudspeth*, 534 So. 2d at 212. The Mississippi Rules of Evidence were adopted January 1, 1986. *Id.*

[65] *Id.*

[66] *Id.* at 214-15. The trial judge refused to order the Commission to allow Hudspeth to discover the subject matter of which their appraisers were to testify. *Id.* Concluding that the Mississippi Rules of Civil Procedure were applicable to eminent domain cases, the court observed that Rule 26(b)(4)(A)(i) specifically makes the subject matter of expert testimony discoverable. *Hudspeth*, 534 So. 2d at 214-15. Therefore, the court held that the trial court unduly restricted discovery and remanded for a new trial. *Id.*

the trial judge's refusal to allow the court appointed appraiser to testify.[67] The court agreed that since section 11-27-89 was inconsistent with Rule 601 of the Mississippi Rules of Evidence, Rule 601 controlled.[68] However, recognizing the importance of disallowing court appointed appraisers to testify in eminent domain proceedings,[69] the court amended Rule 601 of the Mississippi Rules of Evidence to incorporate section 11-27-89.[70] Anticipating a similar conflict with Rule 706 of the Mississippi Rules of Evidence 706,[71] the court also amended it to provide that section 11-27-89's procedures for appointing experts in eminent domain cases shall remain in full force and effect to the extent to which they do not conflict with Rule 706.[72] As to the effective date of the amendments, the court held the the "least discommoding effect" would be achieved by a retroactive application of both rules to January 1, 1986.[73]

II. SETTLEMENTS AND THE DETERMINATION OF DAMAGES

Whittley v. City of Meridian[74] presented the Mississippi Supreme Court with the opportunity to modify the prodedure used to determine damages due a plaintiff where one or more co-defendants have settled with the plaintiff.[75]

The action arose when a side-slanted refuse bin fell on four-year old Maranda Ann Whittley.[76] Two defendants settled with Maranda prior to trial.[77] At the close of all the evidence, the jury returned a verdict for the City of Meridian.[78] Plaintiff appealed.[79]

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[67] *Hudspeth*, 534 So. 2d at 213.

[68] *Id.*

[69] *Id.* The court noted that the court appointed appraiser is an "integral" part of this process because his or her valuation of the compensation and damage award is used to determine the amount which the Commission must deposit with the court before it may "quickly take" the land or right of way. *Id.* While the court commented that the part of the statute which makes these appraisers incompetent as witnesses intrudes upon the court's rule making power, the court stated that "[w]here the invasion is minor and where otherwise the legislative enactment is upon a matter of public policy within legislative authority, it may be appropriate that we give deference to the legislature's judgment." *Id.*

[70] *Id.* The amended rule reads: "Every person is competent to be a witness except as restricted by MISS. CODE ANN. § 13-1-5 (competency of spouses) and § 13-1-11 (persons convicted of perjury or subordination of perjury), § 11-27-89 (court appointed appraisers in eminent domain cases), or by these rules." *Hudspeth*, 534 So. 2d at 213.

[71] *Hudspeth*, 534 So. 2d at 213. Rule 706 gives trial courts general authority to appoint expert witnesses. MISS. R. EVID. 706 (1988).

[72] *Hudspeth*, 534 So. 2d at 213.

[73] *Id.*

[74] 530 So. 2d 1341 (Miss. 1988).

[75] *Whittley*, 530 So. 2d at 1346.

[76] *Id.* at 1342. Maranda's mother filed suit on her behalf against the City of Merid-

On appeal, appellant argued, *inter alia*, that the trial judge erred when he instructed the jury that they could not give the appellants a verdict unless they found that their total damages were greater than the amount guaranteed to be paid by the other defendants who had settled with Maranda.[80]

The Mississippi Supreme Court reversed and remanded for a new trial, holding, *inter alia*, that the jury should not have been informed of the amount of the settlements.[81] Reasoning that informing jurors of the amount of a settlement would unnecessarily influence their decision, the court concluded that the jury may only be informed of the existence of a settlement.[82]

III. MOTIONS IN LIMINE

In addition to modifiying the prodedure used to determine damages due a plaintiff where one or more co-defendants have settled with the plaintiff,[83] the Mississippi Supreme Court also adopted a test to be used in reviewing motions in limine in *Whittley v. City of Meridian.*[84]

As stated previously, the action arose when a side-slanted refuse bin fell on four-year old Maranda Ann Whittley.[85] Before the trial, the plaintiff learned that the City's engineer had received materials from the Consumer Products Safety Commission concerning potential dangers associated with side-slanted refuse bins.[86] However, when the City's engineer was called as an adverse witness during the plaintiff's

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ian (the City), Taylor Properties, Ltd. (the owner of the apartment complex where the refuse bin was located), Bill Gordon Enterprises (the manufacturer and seller of the refuse bin), Payson Casters (the maker of the wheels on the refuse bin), and the Leach Company (the manufacturer of the garbage trucks used by the City). *Id.*

[77] *Id.* Taylor Properties, Ltd. reached a structured settlement with Maranda for approximately $2.5 million dollars and Payson Casters settled for $25,000. *Id.*

[78] *Id.* The manufacturer of the bin, Bill Gordon, was granted a directed verdict. *Id.*

[79] *Id.*

[80] *Id.* at 1345-46. A procedure similar to the one the trial court used was approved by the court in Garcia v. Coast Elec. Power Assn., 493 So. 2d 380, 385 (Miss. 1986). *Whittley*, 530 So. 2d at 1346.

[81] *Whittley*, 530 So. 2d at 1346.

[82] *Id.* The court held that the trial judge shall reduce any amount awarded by the jury by the present value of the settlement. *Id.*

[83] *Id. See supra* notes 74-82 and accompanying text.

[84] *Whittley*, 530 So. 2d at 1344-45.

[85] *Id.* at 1342. *See supra* note 77.

[86] *Whittley*, 530 So. 2d at 1343.

case-in-chief, the plaintiff's attorney was not allowed to question him about those materials because the trial court had granted the City's motion in limine excluding any reference to the materials.[87] Nonetheless, when one of the defendants' attorneys cross-examined the adverse witness, he testified that ". . . he had never received any information that the garbage bins were unstable or dangerous."[88] The jury returned a verdict for the City and the plaintiff appealed.[89]

The Mississippi Supreme Court reversed and remanded for a new trial, holding, *inter alia*, that "[t]here was no basis for the court's exclusion of the letter."[90] Explaining that the primary purpose of a motion in limine was to exclude highly prejudicial evidence and not to exclude irrelevant evidence,[91] the court adopted a two prong test for determining when a motion in limine should be granted: 1) the evidence must be inadmissible under the rules of evidence; *and* 2) the mere reference to the evidence at trial would tend to prejudice the jury.[92] Based upon this test, the court concluded that the trial court erred in granting the motion in limine.[93]

IV. TIME PERIOD FOR POST-TRIAL MOTIONS

In *Telford v. Aloway*[94] the Mississippi Supreme Court announced that trial judges have no authority to enlarge the ten-day time limit for post-trial motions found in Rule 59(b) of the Mississippi Rules of Civil Procedure.[95]

On May 6, 1986 a judgment entered against Shelby Aloway provided that the parties would have thirty days within which to file any post-trial motions.[96] However, counsel for the defendant warned plaintiffs' counsel that he would oppose any motions made after the ten-day time limit imposed by Rule 59(b).[97] Ignoring defense counsel's admonition, plaintiffs filed a motion for a new trial or additur on May 28, 1986, twenty-two days after entry of the judgment.[98] Despite Aloway's objection, the trial court refused to strike the motion as untimely and denied the motion on the merits on August 5, 1986.[99] Thereafter, the Telfords filed a timely notice of appeal on August 15, 1986.[100]

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[87] *Id.* The engineer was questioned about the material out of the presence of the jury in order that a record could be made. *Id.*

[88] *Id.* The trial court also denied plaintiff's counsel's requests to impeach the witness with the materials from the Consumer Products Safety Commission. *Id.*

[89] *Id.*

[90] *Id.* The court also found that the trial court's refusal to allow the City's engineer to be impeached with the materials violated the plaintiff's right to due process. *Id.* at 1344.

[91] *Id.* at 1343-44.

[92] *Id.* at 1344. The test adopted by the court was announced by the Kansas Supreme Court in State v. Quick, 226 Kan. 308, 311, 597 P.2d 1108 (1979). *Whittley*, 530 So. 2d at 1344.

[93] *Whittley*, 530 So. 2d at 1343-45.

[94] 530 So. 2d 179 (Miss. 1988).

[95] *Telford*, 530 So. 2d at 181. Rule 59(b) provides that a motion for a new trial must be served within 10 days after the judgment is entered. MISS. R. CIV. P. 59(b).

[96] *Telford*, 530 So. 2d at 180. Mr. and Mrs. Telford filed suit against Shelby Aloway

On appeal, Aloway argued that the trial court erred in refusing to strike the Telfords' motion as untimely and therefore, the Telfords' notice of appeal was untimely because the thirty-day period within which to file a notice of appeal began to run on the date judgment was entered, May 6, 1986 and had expired long before the Telfords filed their notice of appeal on August 15, 1986.[101]

The Mississippi Supreme Court dismissed the appeal, holding that the trial judge had no discretion to enlarge the ten-day time limit imposed by Rule 59(b).[102] Interpreting the ten-day time limit to be jurisdictional and mandatory, the court declared that the trial court had no jurisdiction to consider the Telfords' untimely motion for a new trial.[103] Therefore, since the thirty day time period within which to file a notice of appeal began to run on May 6, 1986, the court held that the Telfords' notice of appeal was untimely.[104]

V. RES JUDICATA

The Mississippi Supreme Court addressed two questions regarding the application of the doctrine of res judicata in *Lee v. Swain Building Materials Co.*[105] and *Wholey v. Cal-Maine Food, Inc.*[106]

A. *Lee v. Swain Building Materials Co.*[107]

Steven E. Lee and Anna T. Lee, residents of St. Bernard Parsh in Louisiana, were injured in an automobile accident involving an em-

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for injuries and damages arising out of an automobile accident. *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.* at 180-81.

[103] *Id.*

[104] *Id.*

[105] 529 So. 2d 188 (Miss. 1988).

[106] 530 So. 2d 136 (Miss. 1988).

[107] 529 So. 2d 188 (Miss. 1988).

ployee of Swain Building Materials Company of New Orleans (Swain).[108] The Lees orginally filed suit against Swain in the Civil District Court of Orleans Parish.[109] However, the Orleans Parish court found that the action was barred by the Louisiana one-year statute of limitations and dismissed the suit.[110]

On the same day the Louisiana court dismissed the Lees' suit, the Lees filed a complaint against Swain in the Circuit Court of Washington County, Mississippi.[111] Swain moved the Mississippi court for summary judgment, arguing that the action was precluded by the previous dismissal in Louisiana.[112] The trial court sustained Swain's motion and dismissed the action with prejudice.[113]

The Mississippi Supreme Court reversed and remanded for a trial on the merits, holding that the Louisiana judgment was not entitled to full faith and credit.[114] Initially, the court noted that Mississippi statutes of limitations apply to all actions filed in Mississippi.[115] Concluding that a dismissal for expiration of a statute of limitaions is not an adjudication on the merits,[116] the court held that such dismissals in sister states are not entitled to full faith and credit.[117]

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[108] *Id.* at 189. Swain is a Mississippi corporation with its principal place of business in Slidell, Louisiana. *Id.*

[109] *Id.*

[110] *Id.* at 189-90.

[111] *Id.* at 190.

[112] *Id.* Swain also argued that the Mississippi court lacked both personal and subject matter jurisdiction. *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.* However, the 1989 Mississippi Legislature amended Mississippi Code Annotated section 15-1-65 to provide that causes of action which arise outside Mississippi may not be maintained in Mississippi if they are barred by a statute of limitation in the place where the cause of action arose, unless the plaintiff is a Mississippi resident. H.B. 1171, Reg. Sess., Miss. Leg. 1989.

[116] *Lee*, 529 So. 2d at 190. While the court acknowledged that Miss. R. Civ. P. 41(b) provides that a dismissal for expiration of a statute of limitations "operates as" an adjudication on the merits, the court explained that "[s]uch a dismissal is not in fact an adjudication upon the merits." *Lee*, 529 So. 2d at 190.

[117] *Lee*, 529 So. 2d at 190. The court stated that an adjudication on the merits is a condition precedent to the applicability of the full faith and credit clause of the United States Constitution. *Id.* The court explained that while dismissals not made upon the merits may bar another suit in the jurisdiction where the judgment was rendered, such dismissals are not res judicata in another state and are not entitled to full faith and credit. *Id.*

B. *Wholey v. Cal-Maine Foods Inc.*[118]

On March 3, 1983, Mark D. Wholey, M.D. and John A. Rogers filed separate suits against Cal-Maine Foods, Inc. and Cal-Maine Eggs, Inc. (Cal-Maine) in the Chancery Court of Hinds County, alleging that Cal-Maine had breached its fiduciary duty to the plaintiffs by receiving secret profits.[119] However, these suits were dismissed on March 13, 1986 for failure to prosecute.[120] Notwithstanding, Wholey and Rogers filed almost identical complaints in the Chancery Court of Hinds County on April 2, 1986.[121]

On June 12, 1986, Cal-Maine filed motions for summary judgment based soley on their contention that the complaints were barred by the six-year statute of limitations set forth in section 15-1-49 of the Mississippi Code.[122] The chancellor granted the motions based on the statute of limitations and the additional ground that the suits were barred by the doctrine of res judicata.[123] The plaintiffs appealed and the two suits were consolidated.[124]

The Mississippi Supreme Court reversed and remanded, holding, *inter alia*, that the defense of res judicata may not be raised by a judge upon his or her motion.[125] After concluding that the ten-year statute of limitations found in Mississippi Code section 11-1-39 (1972) was the applicable statute of limitations,[126] the court addressed the issue of whether or not the chancellor erred in dismissing the cases upon an application of the doctrine of res judicata.[127] The court explained that

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[118] 530 So. 2d 136 (Miss. 1988).

[119] *Wholey*, 530 So.2d at 137. Wholey and Rogers were partners in an limited partnership which was managed by Cal-Maine. *Id.* The partnership was dissolved on December 31, 1978 because it was economically unsuccessful. *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.* The court explained that by its own terms, the ten-year statute of limitations provided for in MISS. CODE ANN. § 11-1-39 (1972) was limited to cases involving the "existence of a trust not cognizable by the courts of common law. . . ." *Wholey*, 530 So. 2d at 139 (quoting MISS. CODE ANN. § 11-1-39 (1972)). Therefore, the court reasoned that the six-year statute of limitations would apply unless the action was purely equitable, in which case the ten-year statute of limitations would apply. *Wholey*, 530 So. 2d at 139. Citing MISS. CODE ANN. § 79-12-41 (1972), the court noted that every partner acts as a trustee of the partnership for any profits derived secretly. *Wholey*, 530 So. 2d at 140. Thus, the court held that since the cases involved the imposition of implied trusts, they were purely equitable actions and the ten-year statute of limitations applied. *Id.*

[127] *Wholey*, 530 So. 2d at 138-39.

Rule 8(c) of the Mississippi Rules of Civil Procedure requires that affirmative defenses, such as res judicata, must be affirmatively plead.[128] Citing *Bell v. First Columbus National Bank*,[129] the court stated that affirmative defenses are waived when they are neither plead nor tried by consent.[130] Therefore, emphasizing the fact that the issue of res judicata was raised for the first time in the chancellor's orders dismissing the cases, the court held that the chancellor erred in granting summary judgment on the basis of res judicata.[131]

VI. The Limits of Personal Jurisdiction

In order for personal jurisdiction to be proper against a defendant, it must be permitted under Mississippi's long-arm statute and the fourteenth amendment's due process clause.[132] The Mississippi Supreme Court confronted questions concerning these statutory and constitutional limitations in *Anderson v. Sonat Exploration Co.*[133] and *Wilkinson v. Mercantile National Bank at Dallas.*[134]

A. *Anderson v. Sonat Exploration Co.*[135]

The primary issue in *Anderson* concerned whether the defendant's acts of driving to Mississippi and having a document conveying real property executed and notarized were sufficient to enable a Mississippi court to exercise personal jurisdiction in a suit alleging deceit in the procurement of the document.[136]

Mrs. Edwina Anderson, a resident of Lamar County, Mississippi, was 86 years old when she decided to give real property interests in Louisana to her niece, Anita Ford Rudolph.[137] On October 23, 1981, Anita and her husband, both residents of Angie, Louisiana, drove to

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[128] *Id.* at 138.

[129] 493 So. 2d 964 (Miss. 1986).

[130] *Wholey*, 530 So. 2d at 138.

[131] *Id.* at 139. The court commented that ". . .none of the pleadings, discovery, motions, etc. reflected by the records in either case mention the prior filing by Wholey and Rodgers, their subsequent dismissal by Chancellor Alexander, or that such might be res judicata." *Id.* at 138.

[132] Wilkinson v. Mercantile Nat'l Bank at Dallas, 529 So. 2d 616, 618 (Miss. 1988) (citing Brown v. Flowers Indus., Inc., 688 F.2d 328 (5th Cir. 1982)).

[133] 523 So. 2d 1024 (Miss. 1988).

[134] 529 So. 2d 616 (Miss. 1988).

[135] *Anderson*, 523 So. 2d at 1024.

[136] *Id.* at 1025.

[137] *Id.* It was not clear exactly what interests Mrs. Anderson intended to convey to her niece. *Id.*

Mrs. Anderson's home and presented her with a document[138] for her to execute.[139] After presenting Mrs. Anderson with the document, the three of them drove to the chancery clerk's office in Purvis, Mississippi, where the document was properly executed by Mrs. Anderson and notarized by the deputy chancery clerk.[140]

Mrs. Anderson filed her bill on July 29, 1985, in the Chancery Court of Lamar County, alleging that Anita deceitfully presented her with a document that had the effect of conveying all of her interest.[141] However, the chancellor granted Anita's motion to dismiss for lack of personal and subject matter jursidiction.[142] Mrs. Anderson appealed.[143]

The Mississippi Supreme Court affirmed in part, reversed in part and remanded, holding, *inter alia*, that both the statutory and constitutional requirments for personal jurisdiction had been satisfied.[144] The court explained that the bill alleged that Anita committed the tort of deceit in Mississippi.[145] Therefore, citing section 13-3-57 of the Mississippi Code,[146] the court reasoned that since it was alleged that a tort was committed in whole or part in Mississippi,[147] then personal jurisdiction was proper provided that the due process requirments of the United States Constitution were satisfied.[148]

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[138] *Id.* The document was prepared by Anita's attorneys in Louisiana and on its face it stated that it was a "donation inter vivos." *Id.* The substance of the document purported to convey Mrs. Anderson's entire interest in some 210 acres of land located in Washington Parish, Louisiana. *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.* The bill prayed that the gift be set aside or that the document be reformed to reflect her true intent, which she contended was to convey only part of the land while retaining all the mineral estate to herself. *Id.* The bill also joined Sonat Exploration Co. (Sonat) as the payor of certain mineral royalties owned by Anita out of which any damages and/or expenses of Mrs. Anderson were to be satisfied. *Id.* Upon Mrs. Anderson's application, the chancellor issued an order attaching any royalties payable to Anita from Sonat. *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.* at 1027. Addressing the issue of subject-matter jurisdiction, the court held that since the action was not a suit to try title, but rather an action for cancellation or reformation of an instrument, then Mississippi courts have subject-matter jurisdiction. *Id.* Citing Tideway Oil Programs, Inc. v. Serio, 431 So. 2d 454 (Miss. 1983), the court explained that where the suit is against the person of the defendant, the fact that the affected land is in Louisiana may make Louisiana law controlling under our "center of gravity" test, but it does not defeat the jurisdiction of our courts. *Anderson*, 523 So. 2d at 1027. Therefore, the chancellor erred insofar as he dismissed the bill for lack of subject-matter jurisdiction. *Id.*

[145] *Anderson*, 523 So. 2d at 1025.

[146] *Id.* Section 13-3-57 provides in part: "Any non-resident person . . . who shall . . . commit a tort in whole or in part in this state against a resident . . . shall by such act or acts be deemed to be doing business in Mississippi." MISS. CODE ANN. § 13-3-57 (Supp. 1988).

Holding that Anita's acts of driving to Mississippi and having a document conveying real property executed and notarized constituted a "purposeful availment" similar to that found in the case of *Hertz Corp. v. Domerque*,[149] the court further concluded that "[a]nyone executing a legal document in a certain state should certainly not be surprised that any ligitation arising from it should be filed in that state."[150] Therefore, the court held that both the statutory and constitutional requirements for personal jurisdiction were satisfied.[151]

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[147] *Anderson*, 523 So. 2d at 1025. Citing Smith v. Temco, Inc., 252 So. 2d 212, 216 (Miss. 1971), the court explained that a tort is committed in part in Mississippi when an injury occurs in Mississippi. *Anderson*, 523 So. 2d at 1025.

[148] *Anderson*, 523 So. 2d at 1026. The court noted that due process requires that the defendant ". . . has certain minimum contacts within [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.* (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). The court further observed that "[t]he due process analysis of personal jurisdiction has one other component, a foreseeability test deriving from World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980)." *Anderson*, 523 So. 2d at 1026-27. The court commented that a good discussion of these due process requirements appears in Administrators of the Tulane Educ. Fund v. Cooley, 462 So. 2d 696, 702-05 (Miss. 1984). *Anderson*, 523 So. 2d at 1026.

[149] 293 So. 2d 463 (Miss. 1974). In *Hertz*, a Mississippi citizen damaged a car he had rented in Nevada and refused to pay for the damage. *Id.* at 464. Hertz brought suit in Nevada, obtained a judgment and brought it to Mississippi to enforce. *Id.* Despite Domerque's challenge that the judgment of the Nevada court was not entitled to full faith and credit because Nevada's exercise of personal jurisdiction over him violated due process, the court held that the judgment was enforcable in Mississippi, reasoning that ". . . the execution of the lease contract and the ensuing use of the leased vehicle on the streets and highways of Nevada were not such a single and isolated contact as to prevent jurisdiction of the Nevada court from attaching." *Id.* at 466. The *Anderson* court explained that in *Hertz* they did not rely soley upon the use of the vehicle and that ". . . the language of the opinion implies that either the execution of the lease or the use of the car would constitute a sufficient contact." *Anderson*, 523 So. 2d at 1024.

[150] *Anderson*, 523 So. 2d at 1027.

[151] *Id.* As for the validity of the attachment order, the court stated that Mrs. Anderson's petition for an attachment order did not substantially comply with MISS. CODE ANN. § 11-31-1, *et seq.* (Supp. 1986) because her affidavit did not include reasons why her ability to recover the amount of her claim may be lost if attachment is not issued and it did not state the amount sought. *Anderson*, 523 So. 2d at 1027-28. Therefore, declaring that strict compliance with statutory procedures is required to employ attachment or garnishment because such proceedings are in derogation of the common law, the court held the chancellor's decree must be affirmed as to the dissolution of the attachment. *Id.*

B. *Wilkinson v. Mercantile National Bank at Dallas*[152]

The Mississippi Supreme Court addressed the issue of whether a Mississippi court could properly exercise personal jurisdiction over a national bank where the bank loaned funds to a gas drilling company and filed deeds of trust on real property located in Mississippi in *Wilkinson v. Mercantile National Bank at Dallas.*[153]

Tomlinson Interests, Inc. (Tomlinson), a Texas corporation qualified to do business in Mississippi, owned a working interest[154] in gas wells in the East Morgantown Field in Marion County, Mississippi.[155] To finance their development and operation of these gas wells, Tomlinson obtained a loan from the Merchantile National Bank at Dallas (MBank)[156] for $108,000,000.00, secured by a deed of trust covering Tomlinson's interest in the gas wells.[157]

Charles Wilkinson, a Mississippi resident, also owned interests in gas wells located in the East Morgantown Field.[158] Wilkinson, along with others who owned similar interests, filed suit alleging that Tomlinson and other operators had over-produced and that the plaintiffs were under-produced and entitled to all of the gas remaining until they produced enough to bring them into balance with the defendants.[159] In the event the pool of gas became depleted before the plaintiffs were brought into balance, the plaintiffs requested a money judgment in order that a cash balancing might be achieved.[160] Alleging that MBank had received monies which were attributable to Tomlinson's selling of the over-production, plaintiffs' initially requested that MBank be required to disgorge all such monies in order to provide a fund for cash balancing, in the event cash balancing was necessary.[161] However, plaintiffs' amended complaint alleged that MBank willfully converted monies which MBank knew did not belong to it or any of the other defendants by refusing to recognize the plaintiffs' interests in the monies which were attributable to the selling of the over-production.[162]

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[152] 529 So. 2d 616 (Miss. 1988).

[153] *Wilkinson*, 529 So. 2d at 616.

[154] *Id.* The term "working interest" refers to the leasee's operating interest under an oil and gas lease. WILLIAMS AND MEYERS, OIL AND GAS TERMS, 979 (6th ed. 1984). For example, "[i]n the simple situation of a lessor who executes a lease, reserving ⅛th royalty . . . the working interest consists of ⅞th of production subject to all costs of exploration and development . . . ." *Id.* at 979-80.

[155] *Wilkinson*, 529 So. 2d at 617

[156] *Id.* MBank is a national banking association organized under the laws of the United States of America, with its principal place of business in Dallas, Texas. *Id.* In consumating the loan to Tomlinson, MBank acted as an agent for a consortium of banks. *Id.*

[157] *Id.* In addition to executing a deed of trust, Tomlinson granted MBank ". . . a security interest in Tomlinson's share of the field and. . .the right to an assignment of Tomlinson's share of production from the field." *Id.*

[158] *Id.* at 617.

[159] *Id.* The plaintiff's allegation of overproduction was based upon operating agreements and a Gas Balancing Agreement. *Id.*

[160] *Id.*

MBank specially appeared and moved to dismiss the action as to them for lack of personal jurisdiction.[163] The chancellor sustained their motion and dismissed them as a defendant to the suit.[164] Wilkinson appealed.[165]

The Mississippi Supreme Court reversed and remanded, holding that both the statutory and constitutional requirements for personal jurisdiction had been satisfied.[166] Confronting the statutory requirments, the court observed that section 81-5-41 of the Mississippi Code provides that any national banking association that invests funds in Mississippi may sue or be sued in actions relating to such investments.[167] The court reasoned that section 81-5-41 may be viewed as a separate long-arm statute or as ". . . extending the *doing business* provision of section 13-3-57 to include the activities described in section 81-5-41."[168] Therefore, since the action against MBank related to its investments in Mississippi, personal jurisdiction was proper under our statutes.[169]

Examining whether the assertion of personal jurisdiction over MBank would be consistent with due process, the court concluded that MBank had "purposefully availed itself of the protection of Mississippi law" by filing financing statements and a deed of trust in order to protect itself against a default by Tomlinson.[170] The court also adopted and applied the rule from the Fifth Circuit that "[w]hen a non-resident takes 'purposeful and affirmative action,' the effect of which is 'to cause business activity, foreseeable by [the defendant], in the forum state,' such action by the defendant is considered a 'minimum contact' for jurisdictional purposes."[171] Therefore, the court held that both the statutory and constitutional requirements for personal jurisdiction were satisfied.[172]

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[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] *Id.* at 617-18.

[165] *Id.* at 618.

[166] *Id.* at 620.

[167] *Id.* at 618.

[168] *Id.* at 618.

[169] *Id.* Additionally, the court observed that the complaint alleged that MBank committed the tort of conversion. *Id.* Despite MBank's argument that no tort was committed in Mississippi because no money was exchanged in Mississippi, the court explained that a tort occurs in this state if the damage occurs in this state. *Id.* (citing Smith v. Temco, 252 So. 2d 212 (Miss. 1971)). Therefore, the court reasoned that since plaintiffs alleged that an injury occurred in this state, MBank allegedly committed a tort in Mississippi and personal jurisdiction was proper under our long-arm statute. *Id.*

[170] *Id.* at 619.

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[171] *Id.* at 620 (quoting Mississippi Interstate Express Inc. v. Transp., Inc., 681 F.2d 1003, 1007 (5th Cir. 1982)).

[172] *Id.* at 620.

CORPORATE, CONTRACT AND COMMERCIAL LAW

Given the task of deciding the ultimate outcome of the profusion of legal issues presented before it during 1988, the Mississippi Supreme Court responded admirably to its docket of cases involving the areas of contract and commercial law. Among the various disputes resolved were those concerning the enforceability of an oral "booking" contract,[1] failure to use reasonable care in the custody and preservation of collateral,[2] breach of express warranty and implied warranty of merchantability,[3] banks right to set-off,[4] oral modification and waiver of contract provisions,[5] proof of damages for breach of contract,[6] buyer's damages for breach of contract,[7] requirements for rescission of a contract on the theory of fraud,[8] Visa/Mastercard merchant agreements,[9] fiduciary duty of pledgor to pledgee,[10] the enforceability of a covenant not to appeal,[11] accommodation endorser's right to collect from guarantor of a promissory note,[12] right of a corporation to maintain suit filed before certificate of authority to do business within the state was suspended,[13] and the enforceability of contract rights of a discharged officer or employee of a corporation.[14]

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[1] Gooch v. Farmers Market Assoc., 519 So. 2d 1214, 1217-18 (Miss. 1988) (oral "booking" contract, although unsigned by party sought to be charged, will be enforced as valid contract as long as course of dealing can be established between parties which evidence binding contract).

[2] Cain v. Robinson, 523 So. 2d 29, 33-34 (Miss. 1988) (where secured party fails to use reasonable care in custody and preservation of collateral in his possession, breach of duty to use reasonable care will be found).

[3] Fitzner Pontiac-Buick-Cadillac v. Smith, 523 So. 2d 324, 326-28 (Miss. 1988) (in order to find breach of express warranty, court must determine that claimed warranty was part of basis of bargain; reasonable opportunity to remedy defects must be allowed before breach of implied warranty of merchantability will be found).

[4] DGNB v. Simrall, 524 So. 2d 295, 300-02 (Miss. 1988) (bank, having knowledge of fiduciary relationship between its depositor and third party, may not set-off such funds against depositor's indebtedness to bank).

[5] Eastline Corp. v. Marion Apt., 524 So. 2d 582, 584 (Miss. 1988) (when owner's acts or conduct evidences knowledge of, agreement to, or acquiescence in work not approved by written agreement as required by contract, waiver of required written agreement may be found).

[6] Eastland v. Gregory, 530 So. 2d 172, 174-75 (Miss. 1988) (where no evidence is presented at trial which substantiates damages claimed to have been caused by breach, no award of damages shall be received).

[7] Guerdon Indus., Inc. v. Gentry, 531 So. 2d 1202, 1208-09 (Miss. 1988) (absent proof of consequential damages, damages buyer may recover for breach of warranty is limited to purchase price of goods).

[8] Ezell v. Robbins, 533 So. 2d 457, 461 (Miss. 1988) (in order to rescind contract on charge of fraud, one must prove by clear, convincing evidence those elements required in order for trial court to order rescission).

[9] First United Bank v. Philmont Corp., 533 So. 2d 449, 455 (Miss. 1988) (until deposits of credit card sales slips are provisionally credited to account, depositary bank is under no duty to make funds available to depositor).

I. General Contract Principles

A. *Mutual Mistake*

Simply put, a mistake which occurs in the formation, performance or discharge of a contract, if "common to both parties (to the written instrument) and by reason of it each has done what neither intended,"[15] is deemed to be a mutual mistake and the courts generally will allow its reformation or rescission.[16] This remedy was sought by the appellant in *Taylor v. Firestone Tire & Rubber Co.*,[17] based upon a disputed settlement agreement.

In June of 1984, Mary Taylor, a customer of the Firestone Tire & Rubber Co., slipped and fell while on the premises and sustained minor injuries.[18] Taylor sought the advise of counsel and approximately four months later, tendered a settlement demand to Firestone.[19] This original demand was for $5,000, $350 of which constituted medical

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[10] Gibson v. Manuel, 534 So. 2d 199, 202-04 (Miss. 1988) (pledgor/officer owes pledgee same fiduciary duties of loyalty and care that officer or director of corporation owes to its shareholders).

[11] Nobile v. Nobile, 535 So. 2d 1385, 1387-88 (Miss. 1988) (agreement not to appeal, or release of right to prosecute writ of error, if entered into by competent parties and supported by adequate consideration, is valid and binding).

[12] Comfort Engineering Co., Inc. v. Kinsey, 523 So. 2d 1019, 1021-22 (Miss. 1988)(accommodation endorser of promissory note is entitled to collect entire balance of note from guarantor of note provided that accommodation endorser has satisfied payment of indebtedness to holder).

[13] Capital Assoc., Inc. v. Sally Southland, Inc., 529 So. 2d 640, 644 (Miss. 1988) (corporation is entitled to maintain suit where said suit was filed before corporation's certificate of authority to do business within state was suspended and did not have to have certificate reinstated as condition to proceeding to trial).

[14] Short v. Columbus Rubber & Gasket Co., 535 So. 2d 61, 65 (Miss. 1988) (while corporation's board of directors may be empowered to remove officer or director at will, contract rights which exist between discharged officer or employee and corporation may not be disregarded with impunity).

[15] 13 S. Williston, Williston on Contracts § 1535 (Jaeger ed. 1970) (quoting Ward v. Lyman, 108 Vt. 464, 188 A. 892 (1937)).

[16] *Id.*

[17] 519 So. 2d 436 (Miss. 1988).

[18] *Taylor*, 519 So. 2d at 436.

[19] *Id.*

bills.[20] Firestone responded with an offer to settle the case for $1,500, inclusive of the $350 in medical bills, but contended that the offer, while acknowledging that Taylor had in fact been injured in the store, was not presented in recognition of any liability.[21]

While this offer was subsequently rejected by Taylor, an oral offer to settle the personal injury claim for $2,000 was conveyed to Firestone by Taylor on February 25, 1985.[22] Firestone accepted this offer two days later through a letter which was accompanied by a check for the requested amount as well as a release form to be signed by Taylor.[23] Taylor did not execute this release nor did she cash the check, although she retained both. Taylor was subsequently hospitalized due to back pain and osteoarthritis, incurring medical bills which totaled $4,669.50.[24]

In October of 1985, Taylor returned the unexecuted release form along with the bank draft that had not been cashed, stating that the minimum settlement demand was now $18,000 and that if no contact was made by Firestone, Taylor would institute legal proceedings.[25] As a result, Firestone filed suit[26] seeking declaratory and injunctive relief, and specific performance of the settlement agreement.[27] The chancellor found that the transactions between Taylor and Firestone amounted to a valid offer and acceptance of the settlement agreement and that the agreement was enforceable.[28] He subsequently ordered Taylor to honor the agreement and declared that this would constitute res judicata thus barring any further claims and causes of action arising out of the incident.[29]

On appeal, Taylor claimed that the settlement agreement should be declared invalid as it was based on a mutual mistake by both parties during the negotiation process.[30] She contended that the $2,000 offer made to Firestone was accepted by Firestone due in part to a consideration of the medical expenses incurred up to that time.[31] She furthered her argument by stating that the additional medical expenses incurred due to her subsequent hospitalization were not considered.[32] Taylor claimed that since these expenses were not included in the element of medical expenses inherent in the agreement, both parties were mistaken in regard to this element and that the agreement should be declared invalid due to mutual mistake.[33]

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[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.* Taylor returned Firestone's unexecuted release form and unsigned check on October 10, 1985 and specifically stated: "Our minimum settlement demand is $18,000. If we do not hear from you by October 21, 1985, we will assume that you do not wish to settle this matter and will prepare a lawsuit." *Id.*

[26] *Id.* at 437. The suit was filed in the Chancery Court of Hinds County. *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.* at 437-38.

Upon reviewing the testimony of the only witness who testified at the trial of this case, William H. Cox, Jr., the attorney for Firestone who had negotiated the settlement agreement, the Mississippi Supreme Court was convinced that while Firestone had consistently denied any liability for the incident, the settlement agreement was the product of Firestone's desire to buy its peace and that no mistake had been made by Firestone as to its reason for accepting Taylor's offer.[34] It was further noted by the court that while the release form was returned unexecuted, Taylor had stipulated that a settlement agreement had been reached.[35] The court found that no evidence had been presented which would support a finding that Firestone had been mistaken in its reasons for accepting the settlement offer, and further, that any mistake made was unilateral in nature on Taylor's part for which no relief was forthcoming in the absence of any evidence of fraud, duress, overreaching, etc.[36] Finding no mutual mistake as to the element of subsequent medical expenses, the Mississippi Supreme Court affirmed the decision of the lower court.[37]

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[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* The Mississippi Supreme Court analogized this contention with that established in a similar case, Pearson v. Weaver, 252 Miss. 724, 173 So. 2d 666 (1965). The court stated:

> [w]here a defending party disclaims any liability in an action and settles simply to buy peace, not to compensate any injuries the plaintiff received, the fact that such plaintiff's injuries were subsequently found to be more serious than when he executed a release cannot give rise to a claim of mutual mistake.

Taylor, 519 So. 2d at 438 (Miss. 1988) (summarizing holding in *Pearson*, 252 Miss. at 731, 173 So. 2d at 669).

For extensive coverage of this reasoning, see Fornea v. Goodyear Yellow Pine Co., 181 Miss. 616, 178 So. 914 (1938); Gunter v. Henderson Molpus Co., 149 Miss. 603, 115 So. 720 (1928); Continental Jewelry Co. v. Joseph, 140 Miss. 582, 105 So. 639 (1925).

[35] *Taylor*, 519 So. 2d at 438. The stipulations made by Taylor during the trial were as follows:

> (1) Issac Byrd, counsel for Taylor, had full power and consent to negotiate the settlement agreement;
>
> (2) an oral offer was made on February 25, 1985 by Byrd for Taylor to settle her personal injury claim for $2,000;
>
> (3) the offer was accepted by Firestone through a letter dated February 27, 1985 and a bank draft and release were forwarded to Byrd from Cox, Firestone's attorney.

Id. at 437.

B. Conflict of Interest

In the seminal case of *Smith v. Dorsey*,[38] the Mississippi Supreme Court determined that teaching contracts extended by county school board officials to their spouses constituted a conflict of interest and were specifically prohibited by section 109 of the Mississippi Constitution.[39]

Following recommendations made by Dr. John Noble, the Claiborne County Superintendent of Education, the Claiborne County School Board extended teaching contracts to spouses of members of the school board.[40] As a result, several taxpayers in Claiborne County brought an action seeking declaratory and injunctive relief against the school board.[41] The chancellor, upon review of the evidence, declared that the contracts entered into with the spouses of the school board's members were null and void.[42] This order was based upon the chancellor's belief that section 109 of the Mississippi Constitution prohibited such contracts as "each defendant had an indirect interest in these contracts as he had been a Trustee of the Claiborne County Board of Education when said Board approved one or more contracts for the employment of the defendants' spouses."[43] The chancellor went on to order that claims of restitution be entered against the spouses in light of the section 109 infractions.[44] Subsequent to this decision, the defendants appealed.

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[36] *Id.* at 438. *See also* 15A C.J.S. *Compromise & Settlement* § 36 (1967) (requirements for invalid contract due to unilateral mistake).

[37] *Taylor*, 519 So. 2d at 438.

[38] 530 So. 2d 5 (Miss. 1988).

[39] *Dorsey*, 530 So. 2d at 9. *Cf.* Frazier v. State by and through Pittman, 504 So. 2d 675 (Miss. 1987). In *Frazier*, the Mississippi Supreme Court held that no conflict of interest existed between an individual serving in the legislature and their voting on general public school laws when their spouse was employed as a public school teacher. The *Frazier* court, in interpreting section 109 of the Mississippi Constitution, found that this section was not intended to prohibit circumstances represented by those present in the *Frazier* case. *Frazier*, 504 So. 2d at 705.

[40] *Dorsey*, 530 So. 2d at 6. The Claiborne County School Board officials originally named as defendants were Jimmy Smith, Daniel Jennings, Calvin C. Williams and Bennie Knox. *Id.* The contracts for teaching positions were extended to Anne Collins Smith, Mary Jennings, Ernestine Williams and Catherine Knox. *Id.*

Two separate sources of funds were identified by Dr. John Noble as providing the salaries for the prospective teachers. *Id.* These were local funds and the State Minimum Program Fund. *Id.*

[41] *Id.* at 5. The suit was filed in the Chancery Court of Claiborne County. *Id.*

[42] *Id.* at 6.

Section 109 of the Mississippi Constitution states in pertinent part:

> No public officer or member of the legislature shall be interested, directly or indirectly, in any contract with the state, or any district, county, city or town thereof, authorized by any law passed or order made by any board of which he may be or may have been a member, during the term for which he shall have been chosen, or within one year after the expiration of such term.[45]

The Mississippi Supreme Court, interpreting the application of this section in a similar but distinguishable set of circumstances,[46] declared that this section "prohibits any officer from: (a) having any direct or indirect interest in any contract (b) with the state or any political subdivision (c) executed during his term of office or one year thereafter, and (3) authorized by any law, or order of any board of which he was a member."[47] The court declared that upon application of these factors, there was no question that each defendant in the instant case had "some manifest interest . . . in the public school employment contracts of their wives."[48] The court noted such direct involvement as the defendants' responsibility in the hiring and firing of their spouses as well as a finding that the school board members made authoritative decisions as to the salaries which were awarded to the public school teachers within their district.[49] Based upon these findings the court conclusively affirmed the chancellor's decision which found the contracts in question to be in violation of section 109 of the Mississippi Constitution.[50]

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[43] *Id.*

[44] *Id.* The chancellor found that the contracts which violated section 109 of the Mississippi Constitution had been effective for several years "up to and including the present date." *Id.*

[45] MISS. CONST. art. IV, § 109.

[46] Frazier v. State by and through Pittman, 504 So. 2d 675 (Miss. 1987). *See supra* note 36.

[47] *Dorsey*, 530 So. 2d at 6 (quoting Frazier v. State by and through Pittman, 504 So. 2d at 693).

[48] *Id.* at 7.

[49] *Id.* The court made it very clear that the recognition of these interests was not to be construed as a questioning of the integrity or fairness of the defendants but that the contacts which existed amounted to an indirect interest which violated section 109 of the Mississippi Constitution. *Id.*

While the court affirmed the finding of the chancellor regarding the violation of section 109 of the Mississippi Constitution, it reversed the trial court's order of restitution.[51] In following its reasoning espoused in a previous action,[52] the court stated that no showing of bad faith existed and value for the services performed by the teachers had been received. The court stated that an award of restitution in this case would basically amount to an award of punitive damages and that "absent a showing of bad faith, or even proof of loss," it would be improperly given.[53]

In a specially concurring opinion, Justice Prather stated that the primary intent of the constitutional framers was "to prevent public officers' judgment from being influenced for personal benefit or private gain."[54] In light of this intent and the rationale previously provided by the court,[55] Justice Prather proposed a three-prong test which should be applied in order to determine if a direct interest was in fact present.[56]

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[50] *Id.* The court likened their holding to that made by the Kentucky Supreme Court in Commonwealth v. Withers, 266 Ky. 29, 98 S.W.2d 24, 25 (1936) wherein it was stated:

> It is a salutary doctrine that he who is intrusted with the business of others cannot be allowed to make such business as object of profit to himself. This is based upon principles of reason, of morality, and of public policy. These are principles of the common law and of equity which have been supplemented and made more emphatic by the foregoing and other statutory enactments.

Id. See also Frazier, 504 So. 2d at 700 (same).

[51] *Dorsey*, 530 So. 2d at 9.

[52] *See* Golden v. Thompson, 194 Miss. 241, 11 So. 2d 906, 907-08 (1942)(public official in performance of duty who relies in good faith on statute later declared unconstitutional by court should not be held civilly liable); Frazier v. State by and through Pittman, 504 So. 2d 675, 704 (Miss. 1987)(same).

[53] *Dorsey*, 530 So. 2d at 8.

[54] *Id.* at 9 (Prather, J., specially concurring).

[55] *See* Frazier v. State by and through Pittman, 504 So. 2d 675, 704 (Miss. 1987)(one who violates constitution in good faith reliance upon statute which specifically allows the unconstitutional conduct may assert the statute as defense to award of damages).

[56] *Dorsey*, 530 So. 2d at 14 (Prather, J., specially concurring). The test proposed by Justice Prather is as follows:

> 1. Does the board member have absolute discretion in the employment or other contract interests?
>
> 2. Is the pecuniary benefit bestowed the result of inclusion in the general class?
>
> 3. Is the benefit insignificant or remote (even if included in a class)?

Id. In applying this test to the instant facts, Justice Prather determined that a violation of section 109 did in fact exist and that as a result, she concurred with the majority

Justice Sullivan, in a scathing dissent, opined that the chancellor was absolutely correct in ordering restitution and that as a result he found the majority opinion to be erroneous.[57] This stance was based upon Justice Sullivan's belief that any violation of section 109 was to result in liability on the part of the violator and such liability was clearly established by judicial precedent.[58] He noted that while a narrow exception existed in cases where one violates the Mississippi Constitution in good faith reliance upon a statute which specifically authorizes the unconstitutional act,[59] the instant ruling did not present such a scenario.[60] He further expressed his objection to the majority opinion by stating:

> [t]he majority by pretending that the restitution here is punitive damages now requires that litigants who succeed in showing the violation of the constitution must also assume the added burden of showing that the constitution was violated in bad faith. If mental gymnastics were on the agenda in the olympic games, the majority would certainly come home with the gold.[61]

This language was again supplemented by Justice Sullivan as he declared that the payments made by the Claiborne County School Board to the teachers who were spouses of the members of the board were "so 'clearly and distinctly' unlawful that the appellants' claim of good faith should be barred."[62] In closing, Justice Sullivan implored the court to follow and uphold the Mississippi Constitution as it is bound to do and to avoid ignoring its principles by "applying principles of equity to uphold an illegal and unconstitutional contract."[63]

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opinion and would affirm the lower court on this issue. *Id.*

[57] *Id.* at 15 (Sullivan, J., dissenting).

[58] *Id. See* Golding v. Salter, 234 Miss. 567, 107 So. 2d 348, 356 (1958)(unauthorized expenditures by county hospital board of trustees are recoverable by state auditor); Miller v. Tucker, 142 Miss. 146, 105 So. 774, 780-81 (1925)(board of supervisors liable for unauthorized expenditures).

[59] Frazier v. State by and through Pittman, 504 So. 2d 675 (Miss. 1987); Golden v. Thompson, 194 Miss. 241, 11 So. 2d 906 (1943).

[60] *Dorsey*, 530 So. 2d at 15 (Sullivan, J., dissenting).

[61] *Id.*

[62] *Id.* at 17. *See* Golding v. Salter, 234 Miss. 567, 595, 107 So. 2d 348, 360 (1958)(rejection of "good faith" defense).

[63] *Dorsey*, 530 So. 2d at 18 (Sullivan, J., dissenting).

C. Arbitration and Award

In *Craig v. Barber*,[64] the Mississippi Supreme Court addressed the legal obligation of arbitrators to give or produce the basis or reasons for the awards granted in the absence of a contractual agreement.[65] Justice Robertson, writing for the court, stated that absent a contractual agreement to the contrary, arbitrators are under no legal obligation to provide the basis or reasons for the awards granted.[66]

Succinctly stated, a construction contract had been entered into by Carl and Nancy Herrin (hereinafter Herrins) and Milton Stewart, Inc. (hereinafter Stewart) whereby certain home improvements were to be made to the Herrins' home.[67] Contained within the contract was an arbitration clause which provided for the orderly resolution of any claims or disputes which might arise during the course of the work to be performed.[68] Unfortunately, a dispute over the work performed did in fact arise which led to a demand for arbitration being filed by Stewart with the American Arbitration Association (hereinafter AAA).[69] Following a five day hearing, Charles F. Craig, the arbitrator appointed by the AAA, entered a written award which provided for payment by Stewart to the Herrins the sum of $48,813.00.[70] Seeking a confirmation of the arbitration award, the Herrins filed a complaint in circuit court.[71] In answering the complaint, Stewart defended on the ground that the arbitrator, Charles F. Craig, suffered from "evident partiality."[72] In order to support this defense, Stewart sought to depose Craig; however, the circuit court "ordered that Craig 'explain and clarify' the basis of his award."[73] Following this order, Craig applied to the Mississippi Supreme Court for a writ of prohibition to grant relief from the court order.[74]

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[64] 524 So. 2d 974 (Miss. 1988).

[65] *Craig*, 524 So. 2d at 975.

[66] *Id.* at 975-76.

[67] *Id.* at 975.

[68] *Id.* The provision read:

> 21. All claims and disputes between the contractor [Stewart] and the owner [the Herrins] arising out of, or relating to, the contract documents or the breach thereof shall be decided by arbitration in accordance with the construction industry arbitration rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise.

Id.

[69] *Id.* This demand, filed December 17, 1984, was for $36,937.73 in additional compensation claimed by Stewart to have resulted from change orders. The Herrins disputed all of the additional compensation claimed except $9,506.40 and counterclaimed for $56,049.04. *Id.*

[70] *Id.* The award also denied the claims advanced by Stewart and declared that all administrative fees and expenses be split between the respective parties. *Id.* For further authority, see Miss. Code Ann. §§ 11-15-199 and -121 (Supp. 1987).

[71] *Id.* The suit was filed in the Circuit Court of the First Judicial District of Hinds County. *Id.* The complaint was based upon Miss. Code Ann. § 11-15-125 (Supp. 1988) which requires the court, upon application by a party to the arbitration filed within 90 days of the receipt of a copy of the award to confirm or vacate the award. Miss. Code Ann. § 11-15-125 (Supp. 1988).

The Mississippi Supreme Court converted and treated the writ of prohibition as an interlocutory appeal.[75] As such, the court reviewed Craig's claim for relief from the order as well as directed the circuit court to proceed without any further evidence of his basis or reasons for the arbitration award.[76] The court reviewed both the AAA's Guide for Commercial Arbitrators and the applicable Mississippi statute and ruled that "absent contractual agreement to the contrary, arbitrators have no legal obligation that the basis or reasons for the award be given."[77]

Stating that as a matter of public policy the State of Mississippi has supported and allowed parties to submit their disputes to an arbitrator and to give effect to the subsequent award, the court reasoned that such a stance should be strictly adhered to especially in light of the present state of overcrowded judicial dockets.[78] This encouragement was supplemented by the court's endorsement of the recent Construction Arbitration Act.[79] Further support for arbitration agreements was recited by the court in its review of past decisions.[80] Finally, the court stated that Craig, in his capacity as arbitrator, was acting under the rules of the American Arbitration Association and as such was not required to provide separate findings on each matter.[81]

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[72] *Craig*, 524 So. 2d at 975. This defense of partiality advanced by Stewart is provided for in § 11-15-133(1)(b) of the Mississippi Code. *Id.* This provision in the Code instructs the court to vacate an award, upon application of a party, where "there was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party." MISS. CODE ANN. § 11-15-133(1)(b) (Supp. 1988).

[73] *Craig*, 524 So. 2d at 975, n.2. The circuit court ordered that the deposition subpoena be quashed but subsequently ordered that Craig prepare "findings of fact setting forth therein all the facts on which he based his arbitration award dated May 13, 1985." *Id.*

[74] *Id.* at 975.

[75] *Id.* at 976. The court noted that the instant case had been docketed before "the advent of the new Rules of the Supreme Court of Mississippi, effective January 1, 1988 . . . . [and further that] [n]othing said here should be taken as an authoritative construction of new Rule 5 (interlocutory appeals) or new Rule 21 (extraordinary writs)." *Id.* at 976, n.3. *See also* Mississippi Publishers Corp. v. Coleman, 515 So. 2d 1163, 1164 (Miss. 1987)(writ of mandamus or other extraordinary relief petition seeking order requiring circuit judge to vacate certain orders); American Tobacco Co. v. Evans, 508 So. 2d 1057, 1059 (Miss. 1987)(writ of prohibition is extraordinary proceeding which traditionally prohibits inferior judge from improperly exercising jurisdiction).

[76] *Craig*, 524 So. 2d at 976.

[77] *Id. See* MISS. CODE ANN. § 11-15-119 (Supp. 1988)(nature of remedy which arbitrators may grant); Rule 42, Construction Industry Arbitration Rules of the American Arbitration Association (same).

[78] *Craig*, 524 So. 2d at 977.

In addressing the error of the circuit court in its belief that the defense of "evident partiality" must be reviewed through the basis of the arbitrator's decision, the Mississippi Supreme Court analogized the instances where a jury's decision is attacked on grounds of particularity.[82] It found that such a review is based upon "what was before the trial court on the motion to recuse" rather than an examination into the legal or factual basis for the judge's decision.[83] In closing, the court found that while the circuit court had correctly quashed Stewart's deposition subpoena, it had indirectly circumvented this order by requiring Craig to disclose his basis or reasons for the award.[84] Finding such an order to be contrary to generally accepted principles of arbitration as well as Mississippi law, the court granted the writ of prohibition.[85]

D. Doctrine of Merger

Upon review of an action brought by purchasers of real property for rescission of the deed, promissory note and deed of trust on the grounds that the seller had breached the real estate contract, the Mississippi Supreme Court adopted the majority view that certain preliminary stipulations concerning the sale of realty which are independent and collateral to the sale survive the merger of previous negotiations into the deed and confer independent causes of action.

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[79] *Id. See* Miss. Code Ann. §§ 11-15-101 to -143 (Supp. 1988)(1981 enactment providing guidelines and enforcement of arbitration agreements).

[80] In Hutto v. Jordon, 204 Miss. 30, 36 So. 2d 809 (1948), the Mississippi Supreme Court held:

> Article of agreement to arbitrate, and awards thereon are to be liberally construed so as to encourage the settlement of disputes and the prevention of litigation, and every reasonable presumption will be indulged in favor of the validity of arbitration proceedings.

Jordan, 204 Miss. at 42, 36 So. 2d at 812.

[81] *Craig*, 524 So. 2d at 976.

[82] *Id.* at 978.

[83] *Id. See* Cantrell v. State, 507 So. 2d 325, 328 (Miss. 1987)(request for recusal based upon review of judge's connections to parties involved or preconceived opinions).

[84] *Craig*, 524 So. 2d at 978.

[85] *Id.*

The case, *Knight v. McCain*,[86] turned on the interpretation of the doctrine of merger which provides that previous negotiations or contracts merge into a deed of conveyance.[87] Generally stated, "the acceptance of a deed tendered in the performance of a contract to convey land merges or extinguishes the covenants and stipulations contained in the contract . . . ."[88] The facts of the case supplied the court with the appropriate circumstance under which to adopt the majority rule previously adopted by thirty-seven jurisdictions.[89]

In November of 1984, Frank and Denise McCain entered into a tentative agreement to purchase a residential lot from Ben Johnson, a real estate developer who was selling lots in a subdivision he owned commonly known as Timberlake Place Subdivision.[90] During the negotiations concerning the sale, the McCains learned that certain problems had arisen in securing building permits on the property.[91] Johnson acknowledged these problems and guaranteed the McCains that in the event any problems were encountered, he "would refund all (their) money and it would not cost a dime to own the property."[92] Johnson, in light of this statement, included a provision in the contract to the same effect.[93]

The contract for sale was subsequently signed at which time the McCains tendered a check for $10,000 to Johnson who requested that the check be made payable to James T. Knight, Johnson's attorney.[94] Four days later, Ben Johnson died.[95] Johnson's wife contacted the McCains and advised them that Knight would contact them, which he did. Unknown to the McCains at the time was the fact that Knight held the deed to the property as security for a loan made to Johnson by Knight.[96] This loan was not repaid by Johnson but was repaid by Knight out of his personal profit sharing plan.[97] As a result, Knight regarded the property as his own.[98]

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[86] 531 So. 2d 590 (Miss. 1988).

[87] *See* West v. Arrington, 183 So. 2d 824, 827 (Miss. 1966)(reservation in deed sufficient to except reserved mineral interest from conveyance of realty); Brown v. King, 214 Miss. 437, 58 So. 2d 922, 923 (1952)(same).

[88] *Knight*, 531 So. 2d at 595 (quoting 77 AM. JUR. 2d, *Vendors & Purchasers*, § 291 (1975).

[89] *Id.*

[90] *Id.* at 591-92. The McCains agreed to purchase a 12-acre lot from Johnson for $50,000. The agreement called for a $10,000 down payment and the remaining balance of $40,000 to be owner-financed. *Id.* at 592.

[91] *Id.*

[92] *Id.*

[93] *Id.* The provision read: "In the event county does not issue building permit, all monies will be refunded." *Id.*

[94] *Id.*

[95] *Id.*

Knight used the sales contract entered into by the McCains and Johnson to form a note, deed and deed of trust. In April, Knight signed the deed and the McCains signed the note and deed of trust.[99] In February, concerned over potential problems with gaining a building permit, the McCains independently sought an answer from the Building and Permit Department.[100] After being advised that no permit would be forthcoming, the McCains contacted Knight who again assured them that they would be able to get a permit and that in the event they did not get a permit, he would refund their down payment and other principal payment but not the interest.[101] Although one payment had been made, the McCains did not remit the second payment based upon their belief that they would not be able to recover the interest in the event the building permit was denied.[102] Knight subsequently agreed to extend the time limits in order to allow the McCains to obtain a building permit. Knight offered to provide the McCains with free legal service to aid them in their quest for a permit and agreed in writing to refund the down payment as well as payments of principal and to reimburse them for the cost of the house plans up to $1,000 but again stated that no interest would be returned to them.[103]

Unhappy with Knight's refusal to refund interest payments in light of their inability to secure a building permit, the McCains retained counsel who demanded that Knight repurchase the property pursuant to the original contract for sale entered into by the McCains and Johnson;[104] however, Knight only offered to repurchase the property for the principal amounts already paid by the McCains. During this time the McCains independently sought to obtain a building permit but these attempts failed.[105] Knight subsequently instituted foreclosure proceedings against the McCains.[106] The McCains responded by filing a complaint against Knight as trustee for Knight & Knight Retirement Trust for breach of contract and asked that all monies be refunded as well as cancellation of the deed and note and payment of attorney's fees.[107] Along with this complaint, the McCains sought a preliminary injunction from the court to prevent the foreclosure proceedings.[108] The chancellor granted the injunction.[109] Knight answered the complaint and filed a motion for summary judgment based upon two separate grounds. First, he sought to have the court declare that "no agency existed between Johnson and himself and second, that even if an agency relationship existed, the real estate sales contract had merged into the deed and was no longer applicable."[110] The chancellor rejected these claims and cancelled the deed, note and deed of trust, holding that Knight was bound by the sales contract and that it was breached upon his refusal to repurchase the land and refund all monies paid.[111] From this decision, Knight appealed.

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[96] *Id.*

[97] *Id.* at 591.

[98] *Id.*

[99] *Id.* at 592. The evidence showed that the McCains believed that Knight was merely acting as the attorney for the Johnson estate and that "they were purchasing the property from the estate." *Id.*

[100] *Id.* at 593.

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.* The McCains had been advised by a Mr. Gholson with the Building and Permit Department of the Hinds County Board of Supervisors that no permit would be

Knight contended that (1) the chancellor had erred in finding as a fact that he had adopted or become bound by the contract between the McCains and Johnson and (2) that even if he was bound by their contract, the chancellor erred in failing to apply the doctrine of merger to hold that a pre-existing agreement is merged into a deed and may not be separately enforced.[112]

Upon review of these assignments of error, the Mississippi Supreme Court found substantial merit in the appellee's argument that the majority rule, followed by thirty-seven jurisdictions, should be adopted by Mississippi. This rule holds that collateral or independent agreements, which are to be performed subsequent to the conveyance, are not merged into the deed of conveyance.[113] The court reviewed the factual situation facing it in the instant case and found that an amendment to the contract or an independent stipulation existed whereby the full purchase price would be refunded if a building permit could

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extended as no central water supply system was available on the property. *Id.* The McCains then contacted the Board of Supervisors to obtain a waiver of the requirement for approval of a well. This was denied. *Id.* at 539-94.

[106] *Id.* at 594.

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.* at 594.

[113] *Id.* at 595. For a detailed listing of pertinent cases decided in these jurisdictions, see *Knight*, 531 So. 2d at 595, n.1.

not be obtained.[114] As the court stated, "[s]ince the purpose of buying this property was for residence construction, the inability to secure a building permit eliminates the purpose for which the conveyance was executed."[115] Thus, finding the instant facts to provide the opportunity to address this issue of agreements collateral to or independent of the subsequent deed, the court adopted the collateral agreement exception followed by the vast majority of jurisdictions.[116] The Mississippi Supreme Court also found that by his actions, Knight had adopted the sales contract as his own and was therefore equitably estopped from denying that he was not bound by the terms of the real estate sales contract.[117] The court likewise upheld the award by the chancellor of attorney's fees as provided in the contract.[118] However, the court declared that while the trial court had included an award of $350 for bulldozer work done on the property and $1,364.57 for pre-judgment interest, these items were not a part of the sales contract and that therefore the chancellor's decision in this respect should be reversed.[119] Accordingly, the decision of the chancellor was affirmed in part and reversed as to the bulldozer work and pre-judgment interest.[120]

II. Banks and Banking

A. *Guaranty*

In *Atkinson v. National Bank of Commerce*,[121] the Mississippi Supreme Court addressed the right of a creditor to maintain a suit against the principal obligor of a note upon default although partial payment had been effectuated by a guarantor. The scenario giving rise to this action began to unfold in July of 1982 when Peter and Norma Atkinson sought financial assistance from the National Bank of Commerce of Mississippi (hereinafter NBC) in order to supplement the operating capital needed for their business in Amory, Mississippi.[122] NBC advanced $20,691.92 to the Atkinsons in return for a promissory note executed by the Atkinsons in favor of the bank.[123] NBC also advanced

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[114] *Id.* at 596.

[115] *Id.*

[116] *Id.*

[117] *Id.* at 597.

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] 530 So. 2d 163 (Miss. 1988).

[122] *Atkinson*, 530 So. 2d at 163.

[123] *Id.* at 164. The note provided that NBC would, at all times, have a security inter-

$1,077.82 to the Atkinsons in order to provide the Atkinsons with the necessary funds to meet their accounts payable. This loan was evidenced by a note which was secured by the Atkinsons' 1979 Chevrolet van.[124]

While the facts presented at trial leave one with a sense of puzzlement as to the underlying purpose, the debts of the Atkinsons had been guaranteed six months earlier through a continuing guarantee agreement between NBC and Scribner Equipment Co., the guarantor.[125] This agreement was effectuated when the Atkinsons defaulted on their notes due to the failure of their business in October of 1982.[126] Some three months later, the Atkinsons sold their van to one H.G. Swanson for $3,200 who in turn received a lien-free title.[127] In handling the transfer of money resulting from the sale, NBC applied $1,143 of the funds to retire the note which had been secured by the van and delivered a check for $1,000 to the Atkinsons. The remaining balance of $1,057 was paid to Scribner Equipment Co.[128] Disgruntled with this payment, the Atkinsons instituted an action against NBC for unlawful conversion of a portion of the proceeds gleaned from the sale of the van.[129] The bank answered, denying the essential allegations of the complaint and asserting a counterclaim for the $20,000 which was at that time unpaid.[130]

After a three year interval,[131] the circuit court dismissed the Atkinsons' complaint with prejudice and held the Atkinsons jointly and severally liable for the principal amount still owed to NBC along with interest and attorney fees.[132] Meanwhile, Scribner Equipment Co. had honored its guaranty agreement with NBC for the debts of the

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est in any funds which it held for the Atkinsons and further, that NBC could, at its option, set off any monies which it held for the Atkinsons against the note or any obligation of the Atkinsons. *Id. See supra* note 4 and accompanying text.

[124] *Atkinson*, 530 So. 2d at 164.

[125] *Id.* The agreement guaranteed payment of the debts of Peter and Norma Atkinson up to a maximum of $20,000. *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.* Suit was filed in the Circuit Court of Oktibbeha County. *Id.* The Atkinsons sought $2,057.00 in actual damages and $5,000,000 in punitive damages. *Id.*

[130] *Id.*

[131] *Id.* On July 3, 1986, NBC made a motion for summary judgment asking for a dismissal of the Atkinsons' original claim and for a judgment on its counterclaim for the $20,000 note. *Id.*

[132] *Id.* at 164. The principal still owed to NBC amounted $18,665.46 and the interest which had accrued totaled to $8,818.71. *Id.* Coupled with attorney's fees, the total judgment against the Atkinsons amounted to $31,606.80, plus costs. *Id.*

Atkinsons and had repaid the maximums stated under the agreement.[133] On appeal, the Atkinsons argued that they were entitled to a reduction of the judgment against them for the sums paid by Scribner as well as a recomputation of the interest following this reduction.[134]

The Mississippi Supreme Court answered this claim by stating that the rule in Mississippi concerning payment by a party secondarily liable in discharge of the primary obligor's debts is that "[p]ayment by a guarantor of another's indebtedness does not extinguish the obligation of the debtor to pay according to his agreement."[135] The court found that under this rule, the Atkinsons were still obligated to pay the full indebtedness provided in their contract with NBC.[136] The court further held that Scribner, as guarantor, had a vested right to seek from the Atkinsons all funds paid by Scribner to NBC in discharge of the Atkinsons' indebtedness.[137] The court stated that the payments made to Scribner were in discharge of its own obligation to NBC and not the Atkinsons' obligations.[138] As a result, the court noted, NBC could bring an action against the Atkinsons to enforce the obligations owed to them under the note, and if such a suit were successful and NBC recovered more than required to be made whole, the excess was, as a matter of law, to be held in trust for Scribner.[139]

In a related matter, the court dismissed two defenses the Atkinsons sought to assert as the court found the evidence presented on both to be insufficient to establish a genuine issue of material fact and therefore denied the assignments of error claimed.[140] Finally, in noting the extreme lack of answers provided by the record in reference to the plethora of legal questions that might be raised, the court dismissed the Atkinsons' claim for conversion contended to have arisen upon NBC's application of the proceeds from the sale of the Atkinsons' van.[141] Again, based upon the lack of showing by the Atkinsons that they were not in default of the loans owing to NBC, the court found that NBC had sufficient rights in the $2,057 that was dispersed upon the sale which eradicated any possible claim of conversion.[142] In closing, Justice Robertson questioned whether the $1,057 paid to Scribner by NBC could possibly be applied to the existing indebtedness and thus reduce the Atkinsons' obligation owed to Scribner, and, further, whether this reduction could also mitigate the amount NBC could seek from the Atkinsons and recover in trust for Scribner.[143] However, these questions were not asserted on appeal and as Justice Robertson noted, were only mentioned as a suggestion that the court was not blind to their presence.[144]

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[133] *Id.* at 164-65. As of January 15, 1986, Scribner had repaid the full $20,000 of which they were obligated under the guaranty agreement. *Id.*

[134] *Id.* at 165.

[135] *Id. See* Stribling Bros. Corp. v. Euclid Memphis Sales, 235 So. 2d 239, 241-42 (Miss. 1970)(obligation of primary obligor is not extinguished upon repayment of indebtedness by guarantor). For a discussion of a related case decided by the Mississippi Supreme Court in 1988, see Comfort Engineering Co., Inc. v. Kinsey, 523 So. 2d 1019 (Miss. 1988). *See supra* note 12.

[136] *Atkinson*, 530 So. 2d at 165.

[137] *Id. See Comfort Engineering Co., Inc.*, 523 So. 2d at 1022 (guarantor has no right of contribution from accommodation endorser). For a discussion on the law of subrogation in Mississippi, see First National Bank of Jackson v. Huff, 441 So. 2d 1317 (Miss. 1983).

[138] *Atkinson*, 530 So. 2d at 165.

[139] *Id.* at 166.

[140] *Id.* The Atkinsons claimed that under another lawsuit filed by them against Scribner in the Circuit Court of Monroe County, the right of Scribner to claim the $20,000 it had paid to NBC was a compulsory counterclaim as defined under Miss. R. Civ. P. 13(a). *Id.* The Atkinsons also contended that the Scribner's guaranty was unsolicited and without their knowledge and therefore constituted a gift. *Id.*

In dissent, Justice Hawkins, joined by Justice Griffin, advanced a meritorious observation that upon payment of the $20,000 by Scribner on the indebtedness owed to NBC by the Atkinsons, Scribner became subrogated to all rights held by the bank on the note.[145] Recognizing this, Justice Hawkins questioned the issue addressed by the majority as being misdirected. This belief was based upon his interpretation of Rule 17(b) of Mississippi Rules of Civil Procedure.[146] The question to be resoled as he saw it was "whether the bank, having been paid in full, should be allowed to proceed to judgment and collect in its own name a note which has been paid by another."[147] He opined that in light of the payment by Scribner to NBC, Scribner should have been required to sue in its own name or in the alternative, been joined as a necessary party. As he found the majority opinion to be a complete anomaly to Rule 17(b), he respectfully dissented.[148]

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[141] *Id.* at 167.

[142] *Id.* The court noted that as of January, 1983, the Atkinsons were in default on the $20,000 note and that the suggestion offered by Norma Atkinson that an extension would be granted if the interest on the note were brought up to date was moot as nothing was presented to the court to evidence this payment and extension. *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.* at 168.

[146] *Id.* MISS. R. CIV. P. 17(b) provides:

> (b) Subrogation Cases. In subrogation cases, regardless of whether subrogation has occurred by operation of law, assignment, loan receipt, or otherwise, if the subrogor no longer has a pecuniary interest in the claim the action shall be brought in the name of the subrogee. If the subrogor still has a pecuniary interest in the claim the action shall be brought in the names of the subrogor and the subrogee.

MISS. R. CIV. P. 17 (b).

[147] *Atkinson*, 530 So. 2d at 168.

B. Statute of Limitations on Deficiency Judgments

In *Rankin County Bank v. McKinion*,[149] the Mississippi Supreme Court held that an action seeking a deficiency judgment on a defaulted installment note must be brought within one year of the date of foreclosure.[150] This holding resulted from the court's consideration of the following facts.

Cleo and Martha McKinion executed a note in favor of Rankin County Bank in the principle amount of $70,257.47, on January 8, 1982. The note carried a 17% per annum interest rate and was secured by a deed of trust on a commercial building and .63 acres of land in Rankin County as well as a deed of trust on a commercial lot also in Rankin County.[151] As fate would have it, the McKinions defaulted on the note and foreclosure proceedings were instituted by Rankin County Bank on February 17, 1983.[152] Following the foreclosure sale of the property held as security, a deficiency existed which totaled $27,211.52, plus attorney's fees and interest under the terms of the promissory note. In December of 1985, the bank sold both properties to a third party.[153]

On June 4, 1986, the bank filed its complaint in chancery court[154] seeking a deficiency judgment for the $27,211.52 plus interest and attorney's fees.[155] In defense, the McKinions asserted that the claim was barred by the statute of limitations.[156] The chancellor, upon hearing the arguments presented on the McKinions' motion to dismiss based upon the pleadings, entered an order dismissing the complaint.[157] This order was based upon the chancellor's finding that the statute of limitations had in fact run and thus barred the action for the deficiency.[158]

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[148] *Id.*

[149] 531 So. 2d 822 (Miss. 1987).

[150] *McKinion*, 531 So. 2d at 826.

[151] *Id.* at 823. The loan advanced to the McKinions was for $68,650.47 plus a title fee of $20.00. Coupled with $1,607.00 of credit life insurance, the amount owed was $70,257.47. *Id.* The note called for quarterly interest payments with a 15% principal plus interest reduction to be paid in July of 1982 and the balance due on or before January 7, 1983. *Id.*

[152] *Id.*

[153] *Id.* The sale of the commercial building plus the .63 acres of land provided $42,500 which was applied against the principal in default.

[154] *Id.* The suit was filed in the Chancery Court of Rankin County on June 4, 1986, some three and a half years after the foreclosure was completed. *Id.*

[155] *Id.*

[156] *Id.*

Rankin County Bank's primary assignment of error was that the chancellor erred in labeling the promissory note as an installment note as described under section 15-1-23 of the Mississippi Code.[159] The bank contended that the note was, in the alternative, a time note which is controlled by section 15-1-49 of the Mississippi Code.[160] The Mississippi Supreme Court found the bank's argument to be misplaced as the emphasis of the statute is placed upon notes which are secured by a mortgage or deed of trust which have been foreclosed.[161] The court found additional support for this interpretation in a previous decision wherein it construed an installment note to mean "a portion of a debt or sum of money which is divided into portions that are made payable at different times."[162] The court found the note involved in the instant case to fall squarely within the form and type of notes contemplated by section 15-1-23 of the Mississippi Code which applies a one year statute of limitation after foreclosure on actions seeking a deficiency judgment on defaulted installment notes.[163] Accordingly, the court affirmed the chancellor on this point, finding the assignment of error to be without merit.[164]

In the alternative, the bank claimed that while the one year statute may apply, "it did not begin to run until after the bank sold the foreclosed property, which it bought at foreclosure, to a third party; otherwise, the argument continued, the bank would not know exactly how much of a deficiency judgment to sue for."[165] The court summarily rejected this argument, finding that the foreclosure sale, held under the provisions of section 89-1-55 of the Mississippi Code,[166] was of a nature envisioned by section 15-1-23 of the Mississippi Code and that therefore the claim for deficiency was barred by its one year limitation period.[167] Finding no error in the chancellor's decision, the Mississippi Supreme Court affirmed the decree.[168]

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[157] *Id.*

[158] *Id.*

[159] *Id.* Section 15-1-23 of the Mississippi Code provides:

> In all cases, no suit or action shall hereafter be commenced or brought against any installment note, or a series of notes of three or more, whether due or not, where said note or notes are secured by mortgage, deed of trust, or otherwise, upon any property, real or personal, unless the same is commenced or brought within one year from the date of foreclosure or sale of the property pledged as security aforesaid note or notes.

MISS. CODE ANN. § 15-1-23 (1972).

[160] *Id.* Section 15-1-49 of the Mississippi Code states that "[a]ll actions for which no other period of limitation is prescribed shall be commenced within six years next after the cause of such action accrued, and not after." MISS. CODE ANN. § 15-1-49 (1972).

[161] *McKinion*, 531 So. 2d at 824.

[162] *Id.* (citing Moon & Sons v. Hood, 244 Miss. 564, 572, 144 So. 2d 782, 784 (1962)).

[163] *McKinion*, 531 So. 2d at 825.

[164] *Id.*

[165] *Id.*

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[166] *See* MISS. CODE ANN. § 89-1-55 (Supp. 1987)(power of sale foreclosure).

[167] *McKinion*, 531 So. 2d at 825.

[168] *Id.* at 826.

CRIMINAL LAW

In 1988, the Mississippi Supreme Court handed down decisions involving a defendant's right to a speedy trial,[1] prosecutorial misconduct,[2] evidentiary matters,[3] voir dire/*Batson* challenges,[4] the death penalty,[5] jury instructions,[6] a defendant's right to counsel,[7] sentencing,[8] necessary elements of various crimes,[9] confessions, witnesses,[10] witness immunity,[11] plea bargain agreements,[12] and miscellaneous issues[13] which include the right to a public trial,[14] right to counsel at a voice lineup,[15] and juror note-taking.[16]

I. Speedy Trial

The Mississippi Supreme Court, in *Fisher v. State*,[17] declared that a 790 day interim between indictment and trial was not violative of the defendant's right to a speedy trial.[18] The defendant, Fisher,[19] was arrested on June 4, 1983, indicted for capital murder and rape on December 1, 1983, and tried for rape on January 30, 1986.[20] Prior to his rape trial, Fisher was convicted of capital murder and sentenced to death.[21] However, Fisher's murder conviction and sentence was subsequently reversed, and on remand he was acquitted.[22] The trial of this case ensued shortly after Fisher's acquittal.[23] Previously, the trial court, on its own motion, continued Fisher's case pending completion of the appeals process stemming from Fisher's murder conviction, or until further motions.[24] The issue presented to the court was whether the defendant's constitutional right to a speedy trial was violated.[25] The court, applying the *Barker* balancing test,[26] reasoned that al-

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[1] *See infra* note 17 and accompanying text.

[2] *See infra* notes 45-73 and accompanying text.

[3] *See infra* notes 74-199 and accompanying text.

[4] *See infra* notes 200-237 and accompanying text.

[5] *See infra* notes 238-260 and accompanying text.

[6] *See infra* notes 261-275 and accompanying text.

[7] *See infra* notes 276-295 and accompanying text.

[8] *See infra* notes 296-320 and accompanying text.

[9] *See infra* notes 321-344 and accompanying text.

[10] *See infra* notes 345-363 and accompanying text.

[11] *See infra* notes 364-398 and accompanying text.

[12] *See infra* notes 399-414 and accompanying text.

[13] *See infra* notes 415-416 and accompanying text.

[14] *See infra* note 418 and accompanying text.

[15] *See infra* notes 427-441 and accompanying text.

[16] *See infra* notes 455-464 and accompanying text.

[17] 532 So. 2d 992 (Miss. 1988).

[18] *Fisher*, 532 So. 2d at 996.

[19] *Id.* at 994. Larry R. Fisher was convicted of rape and sentenced to life imprisonment. *Id.* Fisher was snared in a police sting operation. *Id.* In 1983, prior to Fisher's arrest, a series of rapes and at least one murder occurred on a stretch of Highway 80, between Meridian and Russell. *Id.* The assailant stalked his victims, lone women at night, and duped them into pulling over by blinking his headlights. *Id.* The police sting operation which resulted in Fisher's arrest included a police woman and another officer, hidden in the car, driving at night on the affected stretch of Highway 80. *Id.* Fisher stopped the police woman using the same modus operandi, blinking headlights, as had been used in the other attacks. *Id.* Subsequently, the victim in the present case came forward and identified Fisher as her attacker. *Id.*

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[20] *Id.* Fisher was indicted for the capital murder of Melinda Weathers and the rape of the victim in the present case on the same day. *Id.*

[21] *Id.* The murder trial proceeded first. *Id.* The murder victim, Melinda Weathers, disappeared along Highway 80 and was later found dead along the same stretch of Highway 80. *Id.*

[22] *Id.* The Mississippi Supreme Court overturned Fisher's conviction and death sentence. *Id. See* Fisher v. State, 481 So. 2d 203 (Miss. 1985). On remand, venue was changed to Rankin County, and a jury acquitted Fisher of the murder charge. *Fisher*, 532 So. 2d at 994.

[23] *Fisher*, 532 So. 2d at 994. A change of venue was granted and trial proceeded. *Id.* Fisher was acquitted on December 14, 1985, and Fisher's rape trial began on January 30, 1986. *Id.*

[24] *Id.* at 994-95. The order was issued on June 18, 1984 and stated:
ORDER

> The Court on its own motion continues the above described cases due to a trial conviction and sentence of the defendant, Larry Fisher, in cause # 694-C of the crime of capital murder. It is the court's understanding that said cause # 694-C is on appeal and based on the foregoing facts, the Court in an effort of judicial economy, and fairness to both sides, continues the above described cases until further motions or request of either the defendant or the state.
>
> SO ORDERED AND ADJUDGED, this the 18th day of June, 1984.

485 days elapsed between the issuance of this order and the trial of the present case. *Id.* at 995.

[25] *Id.* Fisher argued that his right to a speedy trial, as guaranteed by the United States Constitution, the Mississippi Constitution, and MISS. CODE ANN. § 99-17-1 (Supp. 1987), was violated. *Id.* at 994-95. The sixth amendment of the United States Constitution states that . . . "in all criminal prosecutions the accused shall enjoy the right to a speedy trial and public trial . . .". U.S. CONST. amend. VI.

[26] *Fisher*, 532 So. 2d at 995. The court stated that Barker v. Wingo, 407 U.S. 514 (1972), articulated the relevant standard for determining violations of the speedy trial clause. *Fisher*, 532 So. 2d at 995.

> *Barker* enumerates four factors which must be considered: (1) length of delay, (2) reason for the delay, (3) the defendant's assertion of his right to a speedy trial and (4) prejudice resulting to the defendant. No mathematical formula exists according to which the *Barker* weighing and balancing process must be performed. The weight to be given each factor necessarily turns on the

though a delay of 423 days is presumed a violation of the speedy trial clause,[27] the absence of any prejudice to the defendant and the legitimate reasons for delay weighed heavily in favor of the State and disposed of any constitutional challenge.[28] The court explained that the State's decision to delay the expenditure of judicial and prosecutional resources on a defendant facing the death penalty was a legitimate reason for delay.[29] Also weighing heavily in the State's favor was Fisher's admission that the delay was not prejudicial.[30] Furthermore, the court held that the order of continuance, which could have terminated by motion,[31] tolled Mississippi's speedy trial statute.[32] Justice Robertson, the lone dissenter, challenged the majority's ratification of a delay of 970 days between arrest and trial.[33] Justice Robertson argued that, as-

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> quality of evidence available on each and, in the absence of evidence, identification of the party with the risk of nonpersuasion. In the end, no one factor is dispositive. The totality of the circumstances must be considered.

Id. (Citing Beavers v. State, 498 So. 2d 788, 790 (Miss. 1986)).

[27] *Fisher*, 532 So. 2d at 995. Citing *Beavers*, the court explained that in the absence of *Barker* factors weighing heavily in favor of the State, a delay of 423 days is presumptively violative of the speedy trial clause. *Id.* Thus, considering the length of delay factor and *Beavers*, the delay of 790 days was violative of the defendant's right to a speedy trial. *Id.*

[28] *Id.* at 996. The court refused to assign little weight to the defendant's assertion of the right factor because the record was unclear as to what the defendant or his counsel knew of the continuance order or when they learned of it. *Id.*

[29] *Id.* at 995. The court stated that generally, the State's refusal to bring a case to trial may not be premised on the fact that the defendant is already in custody for another crime. *Id.* (citations omitted). However, the court explained that where the defendant is under a death sentence, post-indictment delay of trial is justified. *Id.* at 995-96. (citing Jamerson v. Estelle, 666 F.2d 241 (5th Cir. 1982)).

[30] *Id.* at 996. Fisher's brief admitted that the delay was not prejudicial. *Id.* In the final analysis, the court held that the two *Barker* factors, which weighed heavily in the States' favor, overcame the presumptive violation of *Beavers*. *Id.* at 995-96.

[31] *See supra* note 8.

[32] *Fisher*, 532 So. 2d at 996-97. Section 99-17-1 entitled "Indictments to be tried within 270 days of arraignment" states that "Unless good cause be shown, and all continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused has been arraigned." MISS. CODE ANN. § 99-17-1 (Supp. 1988). The court, citing Nations v. State, 481 So. 2d 760, 762 (Miss. 1985), explained that the trial judges written order of continuance is equivalent to a judicial determination that good cause existed, and the order tolled the 270 day time limit. *Fisher*, 532 So. 2d at 996-97.

The court reasoned that since the order provided for its own termination by motion, and since the defendant failed to make a motion, the order tolled the speedy trial statute until the prosecution's motion to set the case for trial. *Id.*

[33] *Fisher*, 532 So. 2d at 1000 (Robertson, J., dissenting). Justice Robertson maintained that the defendant's sixth amendment right to a speedy trial was violated. *Id.*

suming the validity of a delay of 544 days is justified where the defendant is under a death sentence, reversal should have been predicated on the unexplained delay of 427 days after the death sentence was reversed.[34]

In *Vickery v. State*,[35] the defendant was tried approximately 1,283 days after her arraignment.[36] The trial court issued eight generic orders of continuance which contributed to the delay.[37] The supreme court opined that where such an order is issued, and the record is silent regarding the reason for delay, the speedy trial statute is not tolled.[38]

In addition, the court held that the delay violated the defendant's sixth amendment right to a speedy trial.[39] Using the *Barker* balancing test,[40] the court reasoned that the unreasonable length of delay[41] coupled with the State's failure to show good cause weighed heavily

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Although Justice Robertson applauded the majority's recitation of the appropriate standard, he chided the majority's application of the *Barker* balancing test. *Id.*

[34] *Id.* at 1001 (Robertson, J., dissenting). Furthermore, Robertson stated that Fisher wrote letters from Parchman demanding a speedy trial. *Id.* In addition, Robertson explained that it was the State's duty to bring the defendant to trial. *Id.* Thus, Robertson reasoned that the assertion of his right to a speedy trial should have been a factor that weighed in Fisher's favor. *Id.* Finally, Robertson argued that common sense dictates the conclusion that enormous prejudice resulted. *Id.* at 1001-02.

[35] 535 So. 2d 1371 (Miss. 1988).

[36] *Vickery*, 535 So. 2d at 1373. Patricia Vickery was convicted for possession of more than one kilogram of marijuana and sentenced to eighteen years. *Id.* Vickery was arrested on January 17, 1983, indicted on February 18, 1983, and ultimately tried on August 28, 1986. *Id.* However, the State was responsible for only 860 days. *Id.* at 1375. The remaining 423 days, attributable to the defendant, tolled the running of the speedy trial statute. *Id.*

[37] *Id.* The orders listed several cases to be continued, and simply stated "For good cause shown the following numbered criminal cases are continued to the next regular term of this court, said causes are numbered on the docket of this court as follows . . ." *Id.*

[38] *Id.* The court rejected the lower court's attempt to circumvent the spirit of the speedy trial statute with generic orders reciting "good cause shown." *Id.* The court further stated that "the state bears the risk of non-persuasion on a good cause issue." *Id.* Therefore, the court concluded that a delay of 870 days without good cause shown violated the defendant's right to a speedy trial under MISS. CODE ANN. § 99-17-1 (Supp. 1981).

[39] *Vickery*, 535 So. 2d at 1376. The court explained that a defendant's constitutional right to a speedy trial, guaranteed by the sixth amendment of the United States Constitution, attaches when the defendant is accused. *Id.* The court further stated that once this right attaches, the *Barker* balancing test is used to determine violations of a defendant's right to a speedy trial. *Id.*

[40] *See supra* note 10.

[41] *Vickery*, 535 So. 2d at 1376-77. The court found the three and one-half year delay prima facie unreasonable. *Id.* at 1377.

against the State.[42] Although the court found that the defendant's failure to assert her right weighed in favor of the State, this lone factor was not determinative.[43] Finally, the court concluded that the resulting prejudice weighed in defendant's favor.[44]

II. PROSECUTORIAL MISCONDUCT

In 1988, the Mississippi Supreme Court was faced with the reviewability of impermissible prosecutional comment on the defendant's failure to testify in the absence of a contemporaneous objection. In *Livingston v. State*,[45] the prosecutor, in a backhanded fashion, violated the general rule which prohibits comment on the defendant's decision not to testify.[46]

During closing arguments, the prosecutor told the jury that according to the jury instructions they were not to take into account the fact that the defendant did not testify.[47] In a five-four decision reversing, the court held the right of an accused not to take the stand is a fundamental right,[48] and [notwithstanding the defendant's failure to

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[42] *Id.* The court reasoned that where the State was responsible for the delay, their failure to show good cause weighed in favor of the defendant. *Id.*

[43] *Id.* The court explained that this factor is never dispositive, but merely a consideration to be weighed against the other factors. *Id.*

[44] *Id.* at 1377-78. The court stated:

> Prejudice is assessed in light of the interest of the defendant which the right to a speedy trial is designed to protect: 1) prevention of oppressive pre-trial incarceration 2) minimization of anxiety and concern of the accused and 3) limitation of the possibility of impairment of defense.

Id. at 1377. The court noted that during Vickery's incarceration she was beaten by other prisoners, tormented by prison guards, and suffered a nervous breakdown. *Id.*

[45] 525 So. 2d 1300, 1305 (Miss. 1988).

[46] *Livingston*, 525 So. 2d at 1305-08. Rickey Livingston was convicted of rape and sentenced as an habitual offender to 40 years imprisonment without possibility of probation or parole. *Id.* at 1302. Livingston's defense was alibi, and he presented four alibi witnesses at his trial. *Id.* However, Livingston did not testify. *Id.*

[47] *Id.* at 1305. At trial, Livingston failed to object to the prosecutor's impermissible comments. *Id.* at 1306.

[48] *Id.* at 1306-08. The court placed great reliance on West v. State, 485 So. 2d 681, 687-88 (Miss. 1985), wherein the court considered a prosecutor's comments on the failure of a defendant to testify despite the absence of a contemporaneous objection. *Livingston*, 525 So. 2d at 1306. The court explained that the review in *West* was premised on the heightened scrutiny given capital cases, and "the fundamental nature of the right asserted." *Id.* Furthermore, the court explained that the decision not to invoke a procedural bar when fundamental rights were involved was carried over into the non-capital arena in Monroe v. State, 515 So. 2d 860 (Miss. 1987) and Griffin v. State, 504 So. 2d 186 (Miss. 1987). *Livingston*, 525 So. 2d at 1306.

In addition, the court stated that the requirement of a contemporaneous objection make a contemporaneous objection],[49] any prosecutional remarks regarding the exercise of this fundamental right is incurrable, reversible error.[50] However, the dissent argued that the failure to make a contemporaneous objection precludes reversal predicated on the claimed error, "unless the error fatally affected the fundamental fairness of the trial."[51]

In addition, the dissent reasoned that the constitutional violation in the present case was not presumed to be so prejudicial as to require automatic reversal."[52] Thus, in light of what the dissent viewed as overwhelming evidence of guilt,[53] the dissent would have affirmed

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allows a judge the opportunity to cure the error, and opposing counsel opportunity to pursue a different course. *Id.* at 1307. However, the court reasoned that neither action by the judge nor opposing counsel could have cured the error. *Id. See* Folse v. State, 519 So. 2d 1224, 1225 (Miss. 1988)(reversal, predicated on prosecutional comments concerning the defendant's silence, preserved by contemporaneous objection).

[49] *Livingston*, 525 So. 2d at 1306-07. The court, quoting West v. State, 485 So. 2d 681, 687-88 (Miss. 1985), stated that "a defendant has a constitutional right not to take the witness stand." *Livingston*, 525 So. 2d at 1306. *See* U.S. CONST., AMEND. V; MISS. CONST., art. XXVI; MISS. CODE ANN. § 13-1-9 (1972); Griffin v. California, 380 U.S. 609 (1965); and Malloy v. Hogal, 378 U.S. 1 (1964).

In describing the scope of the prohibition on comments regarding the defendant's refusal to testify, the court stated that the prosecutor should not, in a friendly or unfriendly manner, comment directly or by innuendo and insinuation, or bring to the jury's attention by any means, the fact that the defendant did not take the witness stand. *Linvingston*, 525 So. 2d at 1308.

[50] *Livingston*, 525 at 1307-08. The court stated that such impermissible comments entitle a defendant to a mistrial. *Id.* at 1307. The court explained that such comments were incurable, and that even a judge's admonition of the jury could not cure the error. *Id.* (Citing Peterson v. State, 357 So. 2d 113, 115 (Miss. 1978)). Thus, the court refused to procedurally bar review of an incurable violation of one of the defendant's fundamental rights, and accordingly reversed. *Id.* at 1308.

[51] *Id.* at 1309. Justice Dan Lee, joined by Justice Anderson and Justice Griffin, rejected the majority's interpretation of *West* and its progeny. *Id.* at 1309-10. Justice Dan Lee reasoned that these cases merely reinforced the courts obligation in a death penalty case to review the record and "see that the accused received a fair trial." *Id.* at 1309. Furthermore, Justice Dan Lee explained that the same rationale was applicable in a noncapital case where the absence of a contemporaneous objection failed to preserve the claimed error for appeal. *Id.* at 1310. Thus, he concluded that reversal was improper and could not be based on the prosecutor's comments which did deny Livingston of a fundamentally fair trial. *Id.*

[52] *Id.* at 1311. Justice Anderson, joined by Chief Justice Roy Noble Lee, chided the majority's decision to place the fifth amendment infraction in the present case within the class of constitutional violations mandating reversal. *Id.* Justice Anderson argued that not only did no such rule exist, but that the United States Supreme Court has held to the contrary. *Id.*

[53] *Id.* Furthermore, Justice Anderson explained that where the evidence of guilt is overwhelming, errors of this type can be harmless. *Id.*

based on a more general fair trial standard.[54]

However, in *Marks v. State*,[55] the court held that the defendant's failure to make a contemporaneous objection procedurally barred an assignment of error predicated upon blatantly improper argument concerning the degree of the defendant's guilt.[56] In short, the prosecutor asked the jury to convict based upon the potential punishment.[57] Although defense counsel failed to object to the argument, he did make a motion for a mistrial after the jury was excused.[58] The Mississippi Supreme Court stated that "this tactic clearly constitutes a procedural bar."[59] The court explained that defense counsel is under a duty to promptly and contemporaneously object to improper argument, and, if sustained, move for a mistrial.[60] The court, although condemning such argument as "presumptively harmful,"[61] held the error to be procedurally barred and without merit.[62] It appears that the court failed to consider the effect of the prosecution's argument in light of the heinous character of the crime, which improperly prejudiced the defendant in the jury's eyes, and seriously impinged upon the defendant's right to a fair trial and jury determination based on the evidence.[63]

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[54] *Id.*

[55] 532 So. 2d 976, 983 (Miss. 1988).

[56] *Marks*, 532 So. 2d at 984. Frederick S. Mark was convicted for the murder of his wife and sentenced to life imprisonment. *Id.* at 977. Shortly before Mary Woods Marks was killed, Marks, having just been released from an alcohol detoxification program, visited some local bars and had several alcoholic drinks. *Id.* In addition, Marks purchased a knife and arranged the fatal meeting with his wife. *Id.* At trial, Marks admitted killing his wife, but denied having intended to do so. *Id.* at 978. Marks testified that he arrived at his wife's house while she was out, and upon her return a quarrel ensued in which she took control of his knife. *Id.* According to Marks, she fled and he subsequently overtook her, wrestled the knife from her, and killed her in the heat of passion. *Id.* The autopsy of Mary Woods Marks revealed 19 stab wounds. *Id.*

[57] *Id.* at 983. In closing argument, the prosecutor argued that a manslaughter conviction would not sufficiently penalize the defendant, and that only a murder conviction could impose the proper punishment. *Id.*

[58] *Id.* at 984. Although the trial court found the argument improper, the court reasoned that it did not constitute reversible error and refused to grant a mistrial. *Id.*

[59] *Id.* (Citing Johnson v. State, 477 So. 2d 196, 209-10 (Miss. 1986)).

[60] *Id.* at 984. The court explained that this gives the trial judge the opportunity to assess the objectionable argument, and, if necessary, admonish the jury or order a new trial. *Id.*

[61] *Id.* The court stated that such argument asks the jury to convict based upon the punishment and without regard to the evidence before them. *Id.* at 983. The court described such argument as incompetent and categorically unrelated to the degree of the defendant's guilt. *Id.* at 984. However, the issue confounding the court was whether the improper argument rose to the level of reversible error. *Id.* at 983.

[62] *Id.* at 984. Although the court's decision was based upon the contemporaneous objection rule, the court noted that the defendant admitted killing his wife, and that the killing was accomplished "in a most cruel manner." *Id.*

In 1988, the court outlined the procedure, without deciding the question of admissibility, to profert proof of other acts of deviant sexual misconduct with other children in a child molestation case. In *Hosford v. State*,[64] the court reversed a conviction in a child molestation case based on prosecutorial misconduct and the erroneous admission of inflammatory, irrelevant evidence.[65] The defendant allegedly engaged in cunnilingus with a ten-year-old girl that had spent the night with his step-children.[66] At trial, the prosecution cross-examined the defendant about acts of deviant, sexual conduct with his step-children.[67] The Mississippi Supreme Court held that it was reversible error for the prosecution to initially confront the defendant with allegations of deviant sexual conduct between him and his step-children during cross-examination.[68] The court stated that the State was under a duty to profert any such evidence during the State's case in chief.[69] The court explained that if the evidence was found admissible, the State could have presented what proof it had, and then cross-examined, at length, the defendant and defense witnesses concerning any such conduct.[70] In addition, the court noted that the error resulting from the State's improper inquiry was compounded by the fact that the State lacked any evidentiary basis for asking such questions.[71] Thus, the court held that where the evidence of guilt is not conclusive, as in this case, the prosecution's unfounded inquiry and assertions constituted reversible error.[72] Although the court seemed to indicate that the presence of conclusive proof of guilt may have been determinative, the court also stated that the mere asking of these questions constituted reversible error.[73]

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[63] Thus, it appears that the apparently overwhelming weight of evidence supporting a verdict of murder mitigated the harm caused by the improper argument, and, therefore, allowed the court, in good conscience, to procedurally bar the error.

[64] 525 So. 2d 789 (Miss. 1988).

[65] *Hosford*, 525 So. 2d at 789. Bill Hosford was found guilty of sexual battery of felonious sexual penetration of a child under twelve years old. *Id.* See MISS. CODE ANN. §§ 97-3-95 and 97-3-97 (Supp. 1988). Hosford had allegedly engaged in cunnilingus with ten year-old girl. *Hosford*, 525 So. 2d at 789.

[66] *Hosford*, 525 So. 2d at 791-92.

[67] *Id.* During the State's cross-examination of the defendant, the prosecution confronted the defendant with questions concerning his alleged physical abuse and mistreatment of his wife and step-children, as well as with alleged acts of deviant, sexual conduct with his step-children. *Id.* at 791-92. Initially, the court stated that it was procedural error to present substantive evidence of the defendant's guilt during cross-examination or rebuttal. *Id.* at 791. (Citing Rooney v. State, 167 Miss. 827, 150 So. 774 (1933)). Furthermore, the court held that evidence of the defendant's physical abuse of his wife or step-children was "manifestly incompetent at any stage of the trial proceedings." *Id.* at 791-92. The court explained that it was inflammatory and extremely prejudicial, evidence, which had no probative value on the issue before the jury. *Id.* at 791.

[68] *Id.* at 792. The court explained that no showing of necessity was made under the guidelines of Rooney v. State, therefore, the manner in which the State presented its case constituted reversible error. *Id.*

[69] *Id.* The court stated that the competency of such evidence could then be determined, and that profert could have been made out of the presence of the jury so as not to inflame or improperly prejudice the jury. *Id.* However, the court specifically noted that it was not addressing the competency or admissibility of such evidence. *Id.*

III. EVIDENCE

A. Rule 609

In 1988, the Mississippi Supreme Court rendered several decisions related to evidence in the field of criminal law.[74] In *McInnis v. State*,[75] the Mississippi Supreme Court outlined the procedure and criteria for determining the "probative value" and admissibility of prior convictions offered to impeach under Rule 609 of the Mississippi Rules of Evidence.[76] The court held that where a prior conviction is offered to

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[70] *Id.*

[71] *Id.* The court conducted a multi-jurisdictional analysis and discussion of the duties and obligations of a prosecuting attorney. *Id.* at 792-94. In short, the court observed that the prosecuting attorney must conduct a criminal prosecution which is fair and assures the defendant of a fair and impartial trial. *Id.* The court reasoned, even if admissible, basic fairness requires an evidentiary basis to ask the defendant questions concerning his guilt in other crimes. *Id.* at 792.

[72] *Id.* at 794. The court relied on State v. Beard, 74 Wash. 2d 335, 444 P.2d 651 (1968), where the defense's failure to object to similar prosecutorial misconduct, coupled with conclusive proof of guilt, resulted in the court affirming the conviction. *Hosford*, 525 So. 2d at 794.

[73] *See supra* note 53.

[74] Cases not treated textually include: Leflore v. State, 535 So. 2d 68, 70 (Miss. 1988) (affirmed circumstantial evidence conviction for business burglary); Whittington v. State, 523 So. 2d 966, 972 (Miss. 1988) (circumstantial evidence murder conviction affirmed); Stokes v. State, 518 So. 2d 1224, 1226 (Miss. 1988) (same).

[75] 527 So. 2d 84 (Miss. 1988).

[76] *McInnis*, 527 So. 2d 88. Rule 609 states:

> (a) General Rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect on a party or (2) involved dishonesty or false statement, regardless of the

impeach under Rule 609, the prosecution must first make a prima facie showing that the prior conviction has probative value as to the defendant's truthfulness.[77] In addition, the court adopted the "discretionary approach" to advance rulings regarding the admissibility of prior convictions for impeachment purposes.[78]

The court explained that impeachment with prior convictions is admissible under Rule 609 only " 'for the purpose of attacking the credibility of the witness and for no other.' "[79] Therefore, the court reasoned that the prior conviction must be relevant to the witness' propensity for truthfulness.[80] Thus, the court held that the prosecution is required to show that the prior conviction has probative value as to the defendant's propensity for lying.[81] Further, the court stated that ab-

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punishment.

MISS. R. EVID. 609(a).

[77] *McInnis*, 527 So. 2d at 88. Robert H. McInnis was found guilty of robbery and sentenced to eight years imprisonment. *Id.* at 85. During the trial the prosecution was allowed to impeach McInnis with evidence of a prior arson conviction. *Id.* at 85-86. The trial court reasoned that since the prior conviction was a first degree arson conviction, its probative value outweighed its prejudice to the defendant. *Id.* The record revealed no inquiry by the circuit court into the circumstances or nature of the prior arson conviction. *Id.* at 87. The Mississippi Supreme Court reversed, holding that the absence of a prima facie showing probative value resulted in a premature determination of admissibility. *Id.* at 89-90.

[78] *Id.* at 86. On appeal, McInnis argued that the trial court's decision to reserve ruling on his motion in limine effectively precluded defense counsel from conducting a proper defense. *Id.* McInnis' motion in limine asked that the prosecution be precluded from using a prior arson conviction to impeach. *Id.* at 85.

The court explained that the settled procedure in federal court vests discretion in the trial judge. *Id.* at 87. Thus, the court concluded that the decision to reserve ruling was within the trial judges discretionary authority. *Id.*

[79] *Id.* at 88. (Citing United States v. Preston, 68 F.2d 626 (5th Cir. 1986)). The court explained that impeachment with prior convictions is based on the premise that "one who in the past has engaged in a deliberate falsehood of felonious dimension may well be more likely to lie in a subsequent appearance on the witness stand than one not so experienced." *Id.* at 88. Thus, the court reasoned that although a prior criminal act has "no impeachment value in and of itself," the introduction of a prior criminal act to impeach, if of the requisite type, is used to question or lessen the credibility of a witness. *Id.*

[80] *Id.* During trial the prosecution argued that McInnis' prior arson conviction was a "crime of violence", and therefore, admissible to impeach. *Id.* However, the trial court found admissibility properly based on the fact that the conviction was for "first degree arson." The court rejected both theories. *Id.* The only evidence presented was the arson conviction and sentence. *Id.* The record revealed no inquiry into the underlying facts or circumstances which would be probative of the defendant's truthfulness. *Id.*

[81] *Id.* at 89. The court reversed based on the prosecution's failure to make the requisite prima facie showing. *Id.* However, the court prefaced its opinion with the observation that the defendant's credibility was a central issue in the prosecution. *Id.* at 84. The

sent this prima facie showing of probative value, there is nothing to balance against its prejudicial effect in determining admissibility.[82]

Finally, the court stated that if the prosecution meets this threshold burden, the trial judge must then make an on-the-record determination of admissibility using the five factor *Crawford/Peterson* balancing test.[83] The court explained that admissibility stems from the trial judge's application of the five factors and results in the determination that the "probative value of the prior conviction outweighs its prejudicial effect."[84]

In *Johnson v. State*,[85] the Mississippi Supreme Court discussed the relationship and application of parts (a)(2) and (b) of Rule 609. The supreme court affirmed the trial court's decision to preclude the defendant from impeaching two of the State's witnesses with prior convictions admissible under Rule 609(a)(2).[86] The witnesses had identified the defendant as the person fleeing the murder scene.[87] Each witness had prior convictions for the manufacture, possession, and transportation of untaxed liquor.[88] Although defense counsel was per-

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court stated that the arson conviction was not specifically identified as the type of arson probative of the defendant's propensity for lying. *Id.* The court examined the various catagories of arson, all of which the court concluded were not indicative of a person's propensity for lying. *Id.* Finally, the court held that the commission of a crime of violence is not per se probative of a person's propensity for truthfulness. *Id.*

[82] *Id.* at 88.

[83] *Id.* at 87. The factors are:

(1) The impeachment value of the prior crime.
(2) The point in time of the conviction.
(3) The similarity between the past crime and the charged crime.
(4) The importance of the defendant's testimony.
(5) The centrality of the credibility issue.

Id. United States v. Crawford, 613 F.2d 1045, 1051 (D.C. Cir. 1979); Peterson v. State, 518 So. 2d 632 (Miss. 1987).

[84] *McInnis*, 527 So. 2d at 87. Citing Peterson v. State, the court reiterated the importance of this determination as a prerequisite of the admission of any evidence of prior convictions. *Id.*

[85] 529 So. 2d 577 (Miss. 1988).

[86] *Johnson*, 529 So. 2d at 588.

[87] *Id.* at 585. Leon Johnson was convicted of murder and sentenced to life imprisonment. *Id.* at 578. Johnson's conviction stems from the robbery and brutal murder of a convenience store operator. *Id.* at 579-80. The two witnesses here in question, Tommy Hill and Jack Amison, were at the store when a policeman arrived to investigate. *Id.* at 580-81. The two men heard the shots that wounded the policeman and saw Johnson with the gun. *Id.*

[88] *Id.* at 586-87. Hill had numerous convictions for possession or transportation of untaxed liquor which was excluded. *Id.* Amison had numerous convictions for the manufacture, possession and transportation of untaxed liquor which was also excluded. *Id.*

mitted to impeach the witnesses with recent convictions for the same type crime,[89] the trial judge refused to allow impeachment with prior convictions for the same type crime which occurred more than ten years earlier.[90]

The supreme court agreed that while the prior convictions were admissible under Rule 609(a)(2),[91] their use was precluded by the ten year prohibition of Rule 609(b).[92] In addition, the court reiterated the fact that a defendant is bound by the notice requirements of Rule 609(b).[93] Finally, the court reasoned that even if the defendant had made a balancing argument and given notice,[94] no error could be predicated on the trial judge's decision to exclude the prior convictions where their probative value was diminished by previous impeachment with recent convictions for the same type crime.[95]

However, in *Johnson v. State*,[96] the court simply held that where a prior conviction is offered to impeach under Rule 609(a)(1), the trial judge's determination of admissibility, as well as his reasons, must be made and articulated on the record.[97] During trial, Johnson admitted on cross-examination that he had recently been convicted of the same crime.[98] The trial judge made no determination of admissibility but simply overruled defense counsel's objection and motion for mistrial.[99]

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[89] *Id.* at 586. Hill admitted to a conviction for possession of untaxed liquor in 1985. *Id.* Amison stated that he had been convicted in 1985 for the manufacture, possession and transportation of untaxed liquor. *Id.*

[90] *Id.*

[91] *Id.* at 587. The court held that "the manufacture, possession or transportation of untaxed liquor is a crime involving dishonesty or false statement under Rule 609(a)(2)." *Id.* The court reasoned that crimes which defraud federal, state, or city tax collection "stand high in the category of crimes affecting veracity." *Id.* Citing United States v. Gellman, 677 F.2d 65 (11th Cir. 1982)(conviction for failing to file federal tax return admissible under Rule 609(a)(2)); Zukowski v. Dunton, 650 F.2d 30 (4th Cir. 1981)(same); United States v. Apuzzo, 555 F.2d 306, 307-8 (2d Cir. 1977)(conviction for possession and transportation of untaxed cigarettes admissible under Rule 609(a)(2)), *cert. denied*, 435 U.S. 916 (1978).

[92] *Johnson*, 529 So. 2d at 587. The court stated that "any" prior conviction introduced under rule 609(a) "is subject to the time limits of Rule 609(b)." *Id.* (Citing McCORMICK ON EVIDENCE § 43 (3d ed. 1984)).

[93] *Johnson*, 529 So. 2d at 587. The court explained that a defendant is subject to the notice requirement of Rule 609(b). *Id.*

[94] *Id.* The court noted that the federal courts have construed the time limitations of Rule 609(b) to establish a rebuttable presumption against admissibility of prior convictions more than ten years old. *Id.* The court explained that the presumption against admission of an overage conviction will "very rarely and only in exceptional circumstances" be rebutted. *Id.*

[95] *Id.* at 588.

[96] 525 So. 2d 809 (Miss. 1988).

[97] *Johnson*, 525 So. 2d at 812. In addition, the court stated that this process should take place out of the hearing of the jury. *Id.* The court further explained that admissibility turns on the trial judge's determination of whether the evidence is "more probative of

The court stated that the determination of admissibility should include an analysis of the same five factors[100] enumerated in *McInnis*.[101] Although the court made no mention of the *McInnis* requirement,[102] the court explained that "as a rule of thumb" a prior conviction has little impeachment value when it is unrelated to a defendant's veracity.[103] The court proceeded with a discussion of the five factors as

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the defendant's credibility than prejudicial." *Id.* at 811. Quoting the Fifth Circuit, the court stated that "failure to make such a determination robs a defendant of the rule's protection." *Id.* at 812 (Citing United States v. Preston, 608 F.2d 626 (5th Cir. 1979)). Furthermore, the court stated that the "state has the burden of proving the circumstances of the prior conviction in showing why it should be admitted." *Johnson*, 525 So. 2d at 812.

[98] *Johnson*, 525 So. 2d at 811. L. V. Johnson was convicted of forcible rape and sentenced to 40 years without parole. *Id.* at 810. The present prosecution and trial was for Johnson's second rape of the same woman. *Id.* Johnson allegedly raped a 76 year-old woman twice during his burglary of her house. *Id.* The rapes occurred approximately 15 minutes apart. *Id.* Johnson was separately indicted and tried for both rapes. *Id.* His first rape conviction and sentence of life without parole was affirmed in Johnson v. State, 511 So. 2d 1360 (Miss. 1987). *Johnson*, 525 So. 2d at 810-11.

On direct examination Johnson admitted to prior convictions of armed robbery, forgery, and grand larceny. *Id.* at 811. On cross-examination the prosecution questioned Johnson about other felony convictions at which time Johnson disclosed his prior rape conviction in *Johnson* I. *Id.*

[99] *Johnson*, 525 So. 2d at 811. The court explained that a prior rape conviction could be used to impeach under Rule 609 *if* its probative value outweighs its prejudicial effect. *Id.* The court further reasoned that rape was a felony, and the conviction occurred within the last ten years. *Id.*

Thus, the balancing of probative value against prejudicial effect was the determinative factor in deciding whether a prior conviction of the same crime was admissible to impeach. *Id.* In the case sub judice no such balancing or determination was made. *Id.*

[100] *Id.* at 812. *See supra* note 66. *See also* United States v. Mahone, 537 F.2d 922 (7th Cir. 1976)(same five factors); Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967)(same).

The court explained that these factors should help guide the trial judge's determination of admissibility when prior convictions are offered to impeach under Rule 609(a)(1). *Johnson*, 525 So. 2d at 812. The court further reasoned that this analytical framework provided a method for articulating the trial judge's determination as well as a medium for ascertaining abuses of discretion on appeal. *Id.*

[101] *See supra* note 58.

[102] *See supra* note 67 and accompanying text. The court noted *McInnis* and other similarly related opinions have been handed down. *Johnson*, 525 So. 2d at 813 n.2.

[103] *Johnson*, 525 So. 2d at 812. In discussing the first factor, the court observed "that convictions which don't relate to credibility, i.e., deceit, fraud, cheating, generally have little probative value for impeachment purposes." *Id.*

they applied in the case sub judice[104] and concluded that the defendant's prior rape conviction was inadmissible.[105]

B. Rule 404[106]

In *Edlin v. State*,[107] the supreme court was faced with determining the admissibility of evidence of a defendant's prior bad acts under Rule 404(b) of the Mississippi Rules of Evidence.[108] The defendant, Edlin, was convicted of the murder of his former girlfriend's companion.[109] During trial the prosecution presented evidence of Edlin's breakup with his girlfriend, his pursuit of her after the breakup, and evidence that he rammed her car.[110] The supreme court reversed, holding that evidence of the car-ramming incident was inadmissible under Rule 404(b).[111] The court explained that the "evidential hypothesis" behind the car-ramming evidence improperly invited the jury to infer that if Edlin was violent on a previous occasion, he is probably guilty of the violence in the crime charged.[112]

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[104] *Id.* at 812-13. Under the first consideration the court concluded that a rape conviction has little bearing on a defendant's credibility or veracity. *Id.* at 812. Secondly, the court reasoned that the nearness of a conviction is irrelevant when the conviction "bears little relation to veracity." *Id.* The court found the third consideration extremely prejudicial. *Id.* The court reasoned that where the prior conviction is of the same type crime, there is invariably a predisposition to find guilt by lay jurors based on the assumption that "if he did it before he probably did it this time." *Id.*

Addressing the final two considerations the court found that the admission of the prior rape conviction destroyed the defendant's credibility, a buy factor in the jury's deliberations, which in turn rendered his testimony, the only direct evidence for his defense, "idle ceremony." *Id.* at 812-13.

[105] *Id.* at 813. The court held that the admission of the prior rape conviction deprived Johnson of a fair trail on this rape indictment. *Id.* The court reasoned that the defendant was on trial solely for the rape indictment and not for his criminal record or similar prior convictions. *Id.* Thus, the court concluded that the analytical framework outlined above will help facilitate fair trials for those defendants with criminal records. *Id.*

[106] Houston v. State, 531 So. 2d 598. (Miss. 1988)(pre-rules decision regarding the admissibility of evidence of the defendant's alleged prior acts of child abuse); White v. State, 520 So. 2d 497 (Miss. 1988)(pre-rule decision holding that defendant's prior sexual conduct admissible to show appellant's lustful, lascivious disposition toward his particular victim).

[107] 533 So. 2d 403 (Miss. 1988).

[108] *Edlin*, 533 So. 2d at 404.

[109] *Id.* John Wayne Edlin was convicted of murder and sentenced to life imprisonment. *Id.* at 403. This was a companion case to Edlin v. State, 523 So. 2d 42 (Miss. 1988).

[110] *Edlin*, 533 So. 2d at 404-07. The evidence showed that Edlin and his girlfriend terminated their relationship on November 14, 1984. *Id.* at 404. Further evidence revealed that on the same day Edlin followed his ex-girlfriend and rammed her car with the jeep he was driving. *Id.*

[111] *Id.* The court stated that the decision of whether prior bad acts are admissible is difficult and perplexing. *Id.* at 407-08. The court explained that this decision must be made in accordance with fundamental notions of fairness aided by an analysis of:

However, the court reasoned that evidence of the breakup was admissible to show motive,[113] and that Edlin's motive, jealously, might be shown in the evidence of his pursuit of his former love.[114] In addition, the court reasoned that the issue of the remoteness regarding these prior deeds was one left to the sound discretion of the trial judge.[115]

Although Justice Anderson agreed with the majority regarding the admissibility of the ramming incident, he argued that it was harmless error.[116] However, Justice Robertson argued that the ramming incident was sufficiently intertwined with the evidence of the breakup, thus, it should have been admissible on the issue of motive.[117]

In *Parks v. State*,[118] the defendant, Parks, was convicted of sexual battery.[119] Parks, posing as a doctor, persuaded his victim, a six year

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> each proffer of other crime proof to determine what evidential hypothesis the jury is expected to use, and weighing the probative force of the line of proof against the need of the prosecutor and the risks specified in rule 403. The more reason there is in the decision to admit or exclude, the more apt it is to be fair.

Id. at 407. Citing 2 WEINSTEIN'S EVIDENCE, ¶ 404 [08] (1986).

During trial the State argued that the car ramming was admissible to show motive. *Edlin*, 533 So. 2d at 408. However, during closing argument the prosecution commented on the ramming incident and proclaimed the defendant to be that sort of man. *Id.* Although no objection was made, the court noted that this statement violated Rule 404(b). *Id.*

[112] *Edlin*, 533 So. 2d at 408. The court reasoned that the salient issue "is what was the evidence used to show." *Id.* In other words, the court, quoting WEINSTEIN, asked "what evidential hypothesis was the jury expected to use?" *Id.* In the instant case, the court explained that the evidence of the ramming incidence "was improperly used under rule 404(b) to show that Edlin acted in conformity with his prior alleged bad acts." *Id.*

[113] *Id.*

[114] *Id.* In addition, the court explained that this sort of evidence, in the appropriate circumstances, might also be admissible to show a scheme or plan. *Id.*

[115] *Id.* at 407. The court stated that the issue of remoteness is decided under the analytical framework of Rule 401 and in accordance with the limitations of Rule 403. *Id.* (Citing May v. State, 524 So. 2d 957 (Miss. 1988)).

[116] *Id.* at 412. Justice Anderson reasoned where proof of guilt is so overwhelming such an infraction is harmless. *Id.*

[117] *Id.* Justice Robertson reasoned that they were both either admissible or inadmissible. *Id.* In addition, Justice Robertson argued that the defendant's failure to object to the prosecution's closing argument precluded the supreme court from using the prosecution's closing remarks to determine the admissibility of evidence. *Id.*

[118] 522 So. 2d 755 (Miss. 1988).

[119] *Parks*, 522 So. 2d at 755. George Allen Parks was sentenced to eighteen years in prison. *Id.* The victim testified that Parks placed his finger in her private place. *Id.*

old girl, to remove her clothes for an alleged examination.[120] At trial, another girl testified that a day before the incident in question, Parks presented himself as a doctor to her and asked if he could examine her.[121] Parks argued that this testimony was inadmissible evidence of another crime.[122] The supreme court disagreed, holding that although the defendant's conversation was reprehensible, it neither constituted a crime nor was evidence of another crime.[123] The court further explained that if the conduct did constitute a crime, the girls testimony would be admissible to identify the defendant.[124]

In *Haynes v. State*,[125] evidence of the defendant's rape trial and conviction was admissible to show motive for the assault.[126] The defendant was awaiting trial on other charges at the time of the assault.[127] The assault was an apparent attempt to silence the State's principal witness in the defendant's upcoming trial.[128] The court explained that evidence of the defendant's rape trial and resulting conviction was admissible to show motive under Rule 404(b).[129] In addition, the court stated that no abuse of discretion occurred in the trial judge's determination that the evidence passed Rule 403 muster.[130]

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[120] *Id.* Parks went to the girl's home while her parents were at work. *Id.* Parks presented himself as a physician sent to inquire about the children's immunizations. *Id.* Parks was not a doctor. *Id.*

[121] *Id.* The girl refused. *Id.*

[122] *Id.*

[123] *Id.* at 756. The conduct was not subject to criminal sanctions. *Id.*

[124] *Id.* At trial the testimony of the second girl was necessary to identify the defendant because the victim was unable to identify him as the "doctor". *Id.*

[125] 520 So. 2d 1367 (Miss. 1988).

[126] *Hayes*, 520 So. 2d at 1369.

[127] *Id.* at 1367-68. Robert Andrews Haynes was convicted of aggravated assault and sentenced under the recidivist statute to 20 years imprisonment. *Id.* at 1368. At the time of the assault Haynes was awaiting trial on charges of rape, kidnapping and carrying a concealed weapon. *Id.* at 1368.

[128] *Id.* The victim, Hayne's ex-girlfriend, was also the victim in Haynes' rape-kidnapping trial. *Id.* The assault occurred the day before Haynes was scheduled to be tried on the rape and kidnapping charges. *Id.* The victim was shot in the leg. *Id.*

[129] *Id.* The court explained that evidence of the accused's impending trial was relevant and showed motive for the assault. *Id.* The court reasoned that the defendant's motive was to silence the State's principal witness in an upcoming trial. *Id.*

[130] *Id.* Rule 403 states:

> Although relevant, evidence may be excluded if its probative value is subsequently outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

MISS. R. EVID. 403. The court agreed with the trial court's determination that the evidences probative value outweighed the danger of unfair prejudice. *Id.*

In *Wheeler v. State*,[131] the defendant was convicted of aggravated assault on a law enforcement officer.[132] The present indictment resulted from a shooting that left one police officer dead and another wounded.[133] At trial, the trial judge denied defense counsel's motion in limine to preclude any mention of the shooting and/or death of the other officer.[134] The supreme court agreed that admissibility was proper since the crime against the other officer was "integrally intertwined" with the aggravated assault of officer Reid.[135]

In addition, the court stated that Rule 404(b) permits admission of other crimes where they "are so inter-connected [with the instant crime] as to be considered part of the same transaction."[136] The court further explained that Rule 404(b) permits admissibility where the other crime is offered to prove "absence of mistake or accident."[137] Finally, the court explained that the prosecution was entitled to present to the jury "the 'complete story of the crime.' "[138]

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[131] 536 So. 2d 1347 (Miss. 1988).

[132] *Wheeler*, 536 So. 2d at 1348. The police officer, Steve Reid, was wounded when he and three other officers attempted to arrest Noah Wheller pursuant to a request by the welfare department. *Id.* at 1349.

[133] *Id.* The State presented evidence that sometime during the incident Wheeler managed to wrestle officer Reid's pistol from his holster and fire three times. *Id.* When Wheeler was finally subdued, Officer Reid was wounded and Officer Jackie Sherrill was dead. *Id.*

[134] *Id.* at 1352.

[135] *Id.* The court reasoned that the two crimes were "integrally related in time [and] place," and "arose out of a common nucleus of operative facts." *Id.* The court noted "the state's legitimate interest in telling a rational and coherent story of what happened." *Id.* The court stated:

> Proof of another crime is admissible where the offense is charged and that offered to be proved are so interrelated as to constitute a single transaction or occurrence or a closely related series of transactions or occurrences. Such proof of another crime is also admissible where it is necessary to identify the defendant, where it is material to prove motive, and there is an apparent relation or connection between the act proposed to be proved and that charged, where the accusation involves a series of criminal acts which must be proved to make out the offense, or where it is necessary to prove scienter or guilty knowledge.

Id. (Citations omitted). In addition, the court noted that the State alluded to other crimes only when it was reasonably necessary to establish the aggravated assault. *Id.*

[136] *Id.* Citing the comment to Rule 404(b). *Id.*

[137] *Id.* The court noted that the evidence was especially important in the instant case because the defendant's defense was based on accident or mistake. *Id.*

[138] *Id.* The court stated that this evidence explained the absence of Officer Sherrill. *Id.* Finally, the court concluded that the evidence passed Rule 403 muster. *Id.*

IV. SEARCHES AND SEIZURES[139]

In *Carney v. State*,[140] the supreme court held that only evidence obtained within the purview of the lawful portion of the search warrant was admissible.[141] The lawful portion of the search warrant, based on probable cause, authorized a search of the defendant's house for a television and radio.[142] However, the police discovered the contraband which forms the basis of this prosecution while engaged in an unlawful search and after their authority to search had ended.[143]

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[139] *See* Strange v. State, 530 So. 2d 1336 (Miss. 1988)("in the day time" language of a search warrant precluded a search at night).

[140] 525 So. 2d 776 (Miss. 1988).

[141] *Carney*, 525 So. 2d at 785. The court explained that the seizure of other contraband not the purpose or object of the search must be made in accordance with the legitimate scope of the warrant. *Id.* Therefore, the court reasoned that the dispositive issue in determining the legality of the seizure is ascertaining the lawful parameters of the search. *Id.*

[142] *Id.* at 783. Charles Everett Carney was convicted of possession of marijuana with intent to deliver. *Id.* at 778. Pursuant in information from an informant, the police obtained a search warrant to search Carney's residence. *Id.* at 780-81. The search warrant authorized a search for a television, radio, and other small items. *Id.* The police were investigating a burglary at Sears in which a television, radio, and other small items were taken. *Id.* at 780. An apparently reliable informant revealed to the police he had seen a Sear's television and radio at Carney's residence. *Id.* at 781.

The court explained that the sufficiency of a search warrant is determined under the "totality of circumstances" test adopted in Lee v. State, 435 So. 2d 674 (Miss. 1983). *Carney*, 525 So. 2d at 781. The test states:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

Id. at 782-83. (Citing Illinois v. Gates, 462 U.S. 213 (1983)). Furthermore, the court explained that the objective determination of probable cause requires facts "sufficient to warrant a man of reasonable caution in the belief that the action taken was appropriate." *Id.* at 783. (Citing Terry v. Ohio, 392 U.S. 1 (1968)). Finally, the court stated that the prosecution bears the burden of proving probable cause. *Id.*

The court concluded that the observations of a reliable informant provided a substantial basis for the issuance of a search warrant which authorized a search of Carney's residence for a radio and television. *Id.* However, the court held invalid that portion of the search warrant purporting to authorize a search for "other small items." *Id.* at 783.

The court reasoned that the reliable informant provided no facts concerning "other small items" which could be used to form a substantial basis for concluding that probable cause existed. *Id.* at 784. The court further reasoned that the partial invalidity of a search warrant did not mandate in total invalidation. *Id.* Adopting the *Aday* rule, the court explained that the lawful portion of a search warrant may be served and enforced. *Id.* at 784-85. (Citing 2 W. LAFARVE, SEARCH AND SEIZURE § 4.6(f)).

The court stated that the duration, scope, and intensity of the search was limited by the lawful portions of the search warrant.[144] Therefore, the court concluded that other contraband obtained beyond the lawful authority of the search warrant should be suppressed.[145] However, the court explained that the "plain view doctrine" permits lawful seizure of other contraband discovered within the lawful limits of the search.[146] Thus, the marijuana packages hidden under a spool-table and in an old stove were unlawfully seized.[147] Further, once the authority of the police to search ended, the marijuana discovered in a continuing search was inadmissible.[148]

In *Rooks v. State*,[149] the police, acting pursuant to information gathered by a witness with police training, stopped the defendant's vehicle and asked to search the trunk.[150] One of the defendants, Montee, refused, explaining that this was a rental car, and that in any event the police officer had no search warrant.[151] The defendants were arrested, and a search of the car disclosed two garbage bags of marijuana.[152] A trace of the rental car[153] and a search of the defendants[154] lead police to a black Chevrolet truck at a Holiday Inn in Greenwood.[155] A local police officer was dispatched to watch the truck while a search warrant was obtained.[156] A search of the truck uncovered over three-hundred pounds of marijuana and other articles associated with smuggling.[157] The trial judge suppressed the marijuana found in the trunk of the car, but admitted the marijuana seized from the truck.[158]

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[143] *Id.* at 784-85. When the police arrived at Carney's residence to execute the search warrant they discovered the radio on the patio. *Id.* at 781. The police subsequently found two envelopes of marijuana secreted under a wooden spool on the patio, and 20 envelopes of marijuana hidden in an old stove in the yard. *Id.* Then the police entered the house and discovered the television and another envelope of marijuana on a bar. *Id.* The police continued their search and uncovered more marijuana. *Id.* at 782.

[144] *Id.* at 785. The lawful portion of the search warrant permitted a search for a television and radio. *Id.* at 783. The court indicated that the meticulous manner in which a search proceeds must be reasonably calculated to lead to the discovery of a television or radio. *Id.* at 785. In addition, the court explained that the authority to search ends once the named items are discovered. *Id.*

[145] *Id.* Therefore, the court reasoned any contraband seized under the unlawful portion of the search warrant was inadmissible, and any contraband obtained in a search incongruent with the legitimate scope of the lawful portion was inadmissible. *Id.*

[146] *Id.* at 785-86. The court held that there must be a warrant limited in scope, and the seized contraband must have been perceived or brought into plain view during a lawful search. *Id.* at 786. However, the court cautioned that evidence in plain view does not justify a warrantless search. *Id.* (Citing Coolidge v. New Hampshire, 403 U.S. 443 (1971)).

[147] *Id.* at 787. Thus, only evidence obtained in a search for a radio and television was admissible. *Id.* The police admitted that they were not searching for a television or radio when they discovered marijuana under the wooden spool and in the stove. *Id.*

[148] *Id.* The seizure of the marijuana in the attic was held unlawful because the television and radio had already been located. *Id.*

[149] 529 So. 2d 546 (Miss. 1988).

[150] *Rooks*, 529 So. 2d at 548-49. The defendants, Ronald J. Rooks and Greg L. Montee, were convicted for possession of marijuana and sentenced to twenty years imprisonment. *Id.* at 548. The witness observed the defendants drive to a location at the Indianola airport not normally travelled by vehicles. *Id.* He watched one of the defendant's retrieved two garbage bags from the nearby grass and placed them in the trunk of the car. *Id.* The witness had two years of criminal justice education, and had witnessed drug "pickups" and arrests. *Id.* After the car left the airport, the witness contacted the

The defendants contended that the search of the truck was invalid since it was based on evidence obtained in an unlawful search of the automobile.[159] The supreme court rejected the defendants contention that search of the automobile was unlawful.[160] Although the evidence was suppressed, the court stated that the police officers had probable cause to stop and search the automobile.[161] The court explained that a

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police and informed them of the events that had transpired and of the car's license plate number. *Id.* Thereafter a police officer stopped the defendant's car. *Id.*

[151] *Id.* The automobile was rented from Mims Rental Agency. *Id.* at 549. Montee stated that he did not have the key to the trunk. *Id.* Then, Rooks stepped out of the car, dropped the key, and then stepped on it as if he was extinguishing a cigarette. *Id.* at 548.

[152] *Id.* at 548-49. The arresting officer smelled marijuana and communicated this fact to the sheriff. *Id.* at 549. The sheriff obtained a search warrant which lead to the search and seizure of the marijuana in the trunk. *Id.*

[153] *Id.* The Mississippi Bureau of Narcotics (hereinafter Bureau) was monitoring the police conversations relating to the airport incident and arrest of the defendants. *Id.* The bureau dispatched an agent to investigate. *Id.* Both the agent and the dispatcher for the highway patrol talked with the Mims Rengal Agency (hereinafter Mims) and learned that the defendants were registered at a Greenwood Holiday Inn. *Id.*

[154] *Id.* Two keys for a Holiday Inn in Greenwood were discovered on the defendants. *Id.*

[155] *Id.* Mims told police officials that she saw Rooks motion to a black chevrolet pickup as he left the rental agency. *Id.*

[156] *Id.*

[157] *Id.* The police discovered a listing of police frequencies nationwide, radio scanner, various sorts of radios, batteries, and other items. *Id.*

[158] *Id.* at 550.

[159] *Id.* at 550-51. The defendants argued that the search of the car was not based on probable cause. *Id.* Therefore, the "fruit of the poisonous tree' error was committed." *Id.* at 551.

[160] *Id.* at 555. The court reasoned that the events that transpired at the airport provided "a classic case of probable cause that these men were carrying contraband." *Id.* Furthermore, the court held that the events were observed and relayed to the police by a reliable person. *Id.*

[161] *Id.*

warrantless search of an automobile is permitted where there exists probable cause of sufficient strength which would authorize a magistrate to lawfully issue a search warrant.[162] As to the existence of probable cause, the court stated:

> It is incumbent upon all judges of this state to scrupulously examine the facts in each case, make a careful evaluation, and in their own best judgment gleaned from life's experiences determine whether probable cause existed for a particular search or issuance of a magistrate's search warrant. . . . it must be information reasonably leading an officer to believe that then and there contraband or evidence material to a criminal investigation would be found.[163]

Finally, the court reasoned that even absent the information gleaned from the automobile, there existed independent probable cause to search the Chevrolet truck.[164]

V. DISCOVERY[165]

In *Darghty v. State*,[166] the trial court refused to allow the testimony of a defense witness because the defendant failed to comply which Rule 4.06 of the Uniform Criminal Rules of Circuit Court Practice.[167] At trial, the prosecution presented the defendant's written confessions.[168] However, the defendant argued that he signed the confessions because his wife represented to him that she would have the charges drastically reduced when he signed over to her title to their truck.[169] The confessions were admitted, and during the defendant's case-in-chief defense counsel called as a witness one of the prisoners in the room during the alleged conversation between the defendant and his wife.[170] The witness' name was not identified to the prosecution in discovery under Rule 4.06.[171] The trial court found that the defendant's failure to comply with Rule 4.06 precluded the witness' testimony.[172] The defendant was eventually convicted on three indictments for having felonious carnal knowledge with his step-daughter.[173]

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[162] *Id.* at 554. (Citing U.S. v. Ross, 456 U.S. 798 (1982); Wolf v. State, 260 So. 2d 425 (Miss. 1972); and Pass v. State, 193 So. 2d 119 (Miss. 1966)).

[163] *Id.* at 554-55. The court stated that the validity of a search and seizure must be examined in accordance with the fourth amendment of the United States Constitution and article III, section 23 of the Mississippi Constitution. *Id.* at 551. However, the court explained that although they were bound by federal precedent regarding the fourth amendment, the court had reserved the prerogative to interpret section 23 differently. *Id.* Nevertheless, the court stated that they had adhered to the "same procedure" adopted by the United States Supreme Court. *Id.* at 554. *See* Illinois v. Gates, 462 U.S. 213 (1983)(adopting totality of circumstances test to determine probable cause).

The court also noted that in addition to the articulated standard, the *Aguiler* and *Spinelli* tests would remain guides to assist in the magistrate's determination of probable cause. *Rooks*, 529 So. 2d at 555. *See* Spinelli v. U.S., 393 U.S. 410 (1969)(two-prong test to determine probable cause); Aguilar v. Texas, 378 U.S. 108 (1964)(Same).

[164] *Rooks*, 529 So. 2d at 555. The court stated that the police separately discovered the involvement of a pick-up truck. *Id.* The court explained that the existence and location of the truck was also obtained from conversations with Mims, the operators of the Holiday Inn, and the Missouri vehicle registration number. *Id.*

[165] *See* Moore v. State, 536 So. 2d 909, 911 (Miss. 1988)(when prosecution volunteers discovery in absence of written request, other discovery may not be withheld which otherwise would be disclosed).

[166] 530 So. 2d 27 (Miss. 1988).

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[167] *Darghty*, 530 So. 2d at 30. Rule 4.06 states in part:

> (a) The prosecution shall disclose to each defendant or to his attorney, and permit him to inspect, copy, test, and photograph upon request and without further order the following:
>
> (1) Names and addresses of all witnesses in chief proposed to be offered by the prosecution at trial;
>
> * * * * *
>
> (c) If the defendant requests discovery under this Rule, the defendant shall, subject to constitution limitations, disclose to the prosecutor and permit him to inspect, copy, test and photograph the following information and material which corresponds to that the defendant sought and which is in the possession or control of the defendant or his counsel;
>
> (1) names and addresses of all witnesses in chief proposed to be offered by the defendant at trial;
>
> * * * * *
>
> Defense counsel shall make the foregoing disclosures simultaneously with the corresponding disclosure from the prosecutor.
>
> * * * * *
>
> (j) If at any time the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, or enter such other order as it deems just under the circumstances.
>
> Willful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

Id. at 31-32; UNIF. CRIM. R. CIR. CT. PRAC. 4.06.

The defendant, Edward Lee Darghty, was charged with three counts of having felonious carnal knowledge with his step-daughter. *Darghty*, 530 So. 2d at 28. Darghty signed a written confession. *Id.*

[168] *Id.* at 29. The confession was signed in the presence of two law enforcement officials. *Id.* The police treated Darghty courteously and gave him all *Miranda* warnings prior to taking his statement. *Id.* at 31.

[169] *Id.* at 29. Darghty made no assertions that the confession was not free and voluntary. *Id.* Darghty claimed that the confession was given as a result of his wife's promises. *Id.* Specifically, Darghty explained that in return for him signing title to a truck over to his wife, which he did, she was to get the charges reduced. *Id.* This conversation allegedly occurred in the jail and in the presence of other prisoners. *Id.* Furthermore, the defendant stated that because of his bad heart condition he was willing to sign a confession to lesser charges in order to avoid the risk of a potentially stiffer sentence. *Id.* The charges were not reduced, and no evidence was presented that the defendant's wife and police conspired to trick the defendant into signing the confession. *Id.*

Initially, the supreme court held that the confession was not rendered inadmissible by the alleged conduct of the defendant's wife.[174] Further, the court stated that the relevancy of the alleged promise went to the credibility and weight to be accorded the confession.[175] Therefore, the court reasoned that the testimony of the excluded witness was relevant to corroborate the defendant's testimony regarding his wife's alleged promise.[176] The supreme court reversed, holding that where a defendant violates Rule 4.06, the court must follow the same procedure applicable when the prosecution violates the rule.[177] The court reasoned that "even-handed application of the rule requires the same procedure to be followed" regardless of whether the prosecution or defense violates the rule.[178]

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[170] *Id.* at 30. The witness, Willie Lee Loveberry, was one of the prisoners present during the alleged conversation. *Id.*

[171] *Id.* Loveberry's name was not furnished to the prosecution as a witness. *Id.* The State objected. *Id.*

[172] *Id.* The lower court reasoned that Rule 4.06 was a self-executing rule, and that fairness precluded the defendant from calling unknown witnesses. *Id.*

[173] *Id.* at 28.

[174] *Id.* at 31. The court reasoned that although the conduct might render a confession inadmissible if engaged in by police officials, the party was not connected with the police investigation and therefore did not invalidate the confession. *Id.* (Citing Colorado v. Connelly, 107 S.Ct. 515 (1986); Penry v. Lynaugh, 832 F.2d 915 (5th Cir. 1987); Lockett v. State, 517 So. 2d 1317 (Miss. 1987)).

[175] *Id.*

[176] *Id.*

[177] *Id.* at 32-33. The court explained that a discovery violation "does not automatically justify exclusion of the evidence." *Id.* at 32. The trial court stated:

> When faced with a discovery violation, technical or otherwise, the trial court should follow this procedure:
>
> (1) Upon defense objection, the trial court should give the defendant a reasonable opportunity to become familiar with the undisclosed evidence by interviewing the witness, inspecting the physical evidence, etc.
>
> (2) If, after this opportunity for familiarization, the defendant believes he may be prejudiced by lack of opportunity to prepare to meet the evidence, he must request a continuance. Failure to do so constitutes a waiver of the issue.
>
> (3) If the defendant does request a continuance the State may choose to proceed with trial and forego using the undisclosed evidence. If the State is not willing to proceed without the evidence, the trial court must grant the requested continuance.

Id. at 23. (Citing Cole v. State, 525 So. 2d 365, 367-68 (Miss. 1987)).

VI. HEARSAY[179]

In *Reed v. State*,[180] the supreme court held that a defendant's prior deposition in a civil suit involving the same transaction was admissible hearsay despite the defendant's decision not to testify.[181] Bill Wood Chevrolet brought a civil suit against the defendant to recover actual damages for the alleged failure to pay for two vehicles.[182] The defendant was deposed and admitted that he had not paid the debt.[183] The defendant was not represented by counsel, and no criminal charges were pending.[184] Shortly after a default judgment was entered, the defendant was indicted and convicted for embezzlement.[185] At trial, the lower court permitted the prosecution to read the defendant's deposition into evidence.[186]

The court held that the deposition was admissible as a hearsay exception under Rule 804 (a)(3) of the Mississippi Rules of Evidence,

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[178] *Darghty*, 530 So. 2d at 33. The court stated that the violation does not permit the lower court to simply exclude evidence. *Id.*

[179] *See* Jackson v. State, 527 So. 2d 654 (Miss. 1988)(hand written note of murder victim held admissible); Kniep v. State, 525 So. 2d 385 (Miss. 1988)(reversal of conviction for failure to admit the remainder of an autopsy report under Rule 106); Gullett v. State, 523 So. 2d 296 (Miss. 1988)(hearsay statements inadmissible and unavailable declarant's statements against penal interest are not sufficiently trustworthy to warrant exception to hearsay rule); Watson v. State, 521 So. 2d 1290 (Miss. 1988)(complaint letters to credit card company admissible in criminal conspiracy case under Rule 803(6)).

[180] 523 So. 2d 62 (Miss. 1988).

[181] *Reed*, 523 So. 2d at 66-67.

[182] *Id.* at 64. Harold Reed was a wholesaler in the car business. *Id.* at 63. Reed's van was disabled while on a trip to Arkansas. *Id.* Reed was forced to purchase a vehicle from Bill Wood Chevrolet. *Id.* Subsequently, Reed and Wood entered into an agreement in which Reed was to take possession of 13 vehicles and attempt to sell them in Olive Branch. *Id.* at 64. Two of the thirteen cars were not paid for nor returned. *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *Id.* at 66. The prosecution called Wood to testify about the transaction. *Id.* On cross-examination, Wood stated that he had filed a civil action concerning the subject matter of the present prosecution. *Id.* Then, on redirect and over defense counsel's objection, Reed's deposition was introduced into evidence. *Id.* Counsel for Reed argued that the deposition was only admissible to impeach should the defendant elect to testify. *Id.* The lower court stated "that the defendant had opened up the subject of the civil suit in cross-examination." *Id.*

"because the statements therein 'so far tended to subject the declarant to civil . . . liability . . ., that a reasonable man in his position would not have made the statements unless he believed them to be true.' "[187] And, despite the defendant's decision not to testify, the court rejected the defendant's assertion that his answers in the deposition did not waive his right against self-incrimination.[188] Finally, the court explained that a civil defendant implicated in a criminal investigation can avoid this problem by obtaining a protective order under Rule 30(b) of the Mississippi Rules of Civil Procedure to postpone civil discovery until final disposition of the criminal proceedings.[189]

Ponthieux v. State[190] involved the admissibility of statements, seemingly hearsay, made in the course of a killing for hire.[191] The defendant, Elster J. Ponthieux, allegedly hired John B. Nixon, Sr. to kill Ponthieux's ex-wife.[192] The murder was carried out by Nixon, Sr., his son, Henry Leon Nixon, and his son's associate, Gilbert Jimenez.[193]

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[187] *Id.* On appeal, the defendant argued that the admission of the deposition "violated his right against self-incrimination" and "constituted a comment on his refusal to testify." *Id.* The court explained that the use of depositions in criminal prosecutions is "controlled by the Mississippi Rules of Evidence and any relevant federal or state constitutional provisions." *Id.* The fifth amendment of the United States Constitution states "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . ." *Id.* at 65. Similarly, the Mississippi Constitution provides that "the accused shall not be compelled to give evidence against himself." *Id.*

[188] *Id.* at 67. The court stated that the defendant's conduct can act as a wavier of his right against self-incrimination. *Id.* The court discussed numerous cases where a defendant's confession and former testimony in a criminal trial was admitted. *Id.* In addition, the court stated that the testimony of "a criminal defendant in a previous civil proceeding has generally been freely admitted against him in a subsequent prosecution . . ." *Id.*

However, the court stated that waiver must be determined on a factual basis. *Id.* The court noted that the defendant was apparently unaware of the fact that he was under criminal investigation at the time of the deposition. *Id.* Nevertheless, the court held that a waiver did occur. *Id.* (Citing Miss. R. Evid. 804(b)(3)).

[189] *Id.* at 67-68. In addition, the court rejected the defendant's assertion that the introduction of the deposition impermissibly constituted comment on the defendants failure to testify. *Id.* at 68.

[190] 532 So. 2d 1239 (Miss. 1988).

[191] *Ponthieux*, 532 So. 2d at 1241. Elster J. Ponthieux was convicted of capital murder and sentenced to life imprisonment. *Id.* "Ponthieux was tried as a principal on the theory that he was an accessory before the fact." *Id.* Ponthieux and the victim, Virginia Ponthieux Tucker, were divorced in 1984. *Id.* Virginia subsequently married Thomas Tucker. *Id.* Virginia was shot and killed at the Tucker home. *Id.*

[192] *Id.* John B. Nixon, Sr., and his son, John B. Nixon, Jr., operated a garage in Utica near the residence of Ponthieux. *Id.* at 1241-42. Nixon, Sr., had another son, Henry Leon Nixon. *Id.* at 1242. Henry Leon and a friend Gilbert Jimeney, were visiting Nixon, Sr., at the time of the murder. *Id.*

[193] *Id.* On the morning of the murder, Nixon, Sr., Henry Leon and Jimeney made

During trial Henry Leon testified to "statements made by . . . Nixon, Sr., and by Ponthieux through Nixon, Sr."[194] On appeal, Ponthieux argued that the testimony was inadmissible hearsay.[195]

The supreme court held that the testimony concerning the statements was properly admitted as non-hearsay under Rule 801(d)(2)(E).[196] The court found that substantial evidence supported the trial court's conclusion that the prosecution established the existence of a conspiracy.[197] Further, the court explained that "the prosecution was entitled to offer evidence of the plan and motive, and . . . to employ the rule 104 procedure to establish rule 801(d)(2)(E) admissibility by showing that a conspiracy preceded consummation of the principal offense."[198] Thus, the court concluded that each statement

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their way into the Tucker home and shot Virginia at "point blank range." *Id.* Thomas Tucker testified that he told Nixon, Sr., that he knew Ponthieux sent him to kill them and that they had money. *Id.* Nixon, Sr., allegedly replied "the deal's already been made." *Id.* Henry Leon's testimony was consistent with Tucker's testimony. *Id.* Jimenez testified that Nixon, Sr., said "the deal done went down." *Id.*

[194] *Id.* at 1243.

[195] *Id.* Ponthieux argued that it was Rule 801 hearsay and inadmissible under Rule 802. *Id.* However, the prosecution argued that the testimony was admissible under the co-conspirators exception to the hearsay rule. *Id.* The trial court ruled that the testimony was admissible under the co-conspirator's exception if the prosecution established the existence of a conspiracy between Ponthieux and the Nixon's to kill Virginia Tucker. *Id.* Thereafter, John Jr., testified that shortly before the murder he went to Ponthieux's residence to pick up some money. *Id.* John, Jr., stated that he received $2,300.00, and that Ponthieux told him that had already paid a lot of money and the job wasn't done yet, and that if anything happened to his son during the job he would kill the Nixons. *Id.*

[196] *Id.* at 1244. The court explained that "once a conspiracy is established, a statement made by a co-conspirator of a party during the course and in the furtherance of the conspiracy is admissible against each conspirator, notwithstanding the confrontation clause or hearsay rule." *Id.* (Citing Bourjaily v. United States, 107 S.Ct. 2775 (1987); MISS. R. EVID. 801(d)(2)(E)).

[197] *Id.* The court rejected the defendant's contention that the co-conspirator exception was applicable only in conspiracy cases. *Id.* The court stated that the basis of the court's determination of whether the prosecution established the existence of a conspiracy was limited to evidence presented at the Rule 104 predicate hearing. *Id.* The court explained that as a reviewing court the court will search the entire record and "employ a clearly erroneous standard of review." *Id.*

[198] *Id.* Rule 104 states:

> (a) Questions of Admissibility Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
>
> (b) Relevancy Conditioned on Fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon,

fell within the parameters of Rule 801(d)(2)(E) since each statement was "by a co-conspirator of a party offered against a party" . . . and "was made in the course of an in furtherance of that conspiracy."[199]

VII. Voir Dire

A. Batson *Challenges*

In 1988, the Mississippi Supreme Court rendered decisions in a number of cases involving challenges to jury composition[200] most of which were brought under *Batson v. Kentucky.*[201] In *Batson*, the

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or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition. If offeror fails to meet the condition, the objector may request the jury be instructed to disregard the evidence, however, such request shall not be a prerequisite to motion for mistrial. For purposes of punitive damages, proof of net worth shall not be offered until the close of evidence and the court has determined that issue will be submitted the jury.

(c) Hearing of Jury. Hearings on the admissibility of confessions shall in all cases by conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interest of justice require or, when an accused is a witness, if he so requests.

(d) Testimony by Accused. The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

(e) Weight and Credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Id.

[199] *Id.* at 1244. The court reasoned that each statement was "by a co-conspirator, Nixon, of a party , Ponthieux, offered against [a party] Ponthieux." *Id.*

[200] Lanier v. State, 533 So. 2d 473, 477 (Miss. 1988) (no proof that under-representation of blacks on jury venire arrived at in discriminatory fashion); Goggins v. State, 529 So. 2d 649, 651 (Miss. 1988) (where defendant was black, defense attorney's use of peremptory challenge to strike all whites does not justify State using its peremptory to strike all blacks); Chisholm v. State, 529 So. 2d 635, 637 (Miss. 1988) (acceptance of other black persons as jurors is no defense to *Batson* claim); Baskins v. State, 528 So. 2d 1120, 1121 (Miss. 1988) (defendant's refusal to accept jury allows later *Batson* challenge to composition); Taylor v. State, 524 So. 2d, 565, 566 (Miss. 1988)(State's use of peremptory challenges to strike all but one black did not violate *Batson*); Abram v. State, 523 So. 2d 1018, 1019 (Miss. 1988) (remanded for *Batson* type hearing on State's use of peremptory challenges which resulted in all-white jury for black defendant); Britt v. State, 520 So. 2d 1377, 1379 (Miss. 1988) (no *Batson* application where defendant charged that prosecutor systematically eliminated men from jury); Dedeaux v. State, 519 So. 2d 886, 888 (Miss. 1988) (remand for *Batson* type hearing where lower court declined to make State articulate reasons for discriminatory use of peremptory challenges); Jackson v. State, 518 So. 2d 1219, 1219 (Miss. 1988) (same).

[201] 476 U.S. 79 (1986). The Court held that "the state's privilege to strike individual jurors through peremptory challenges is subject to the commands of the Equal Protection Clause." *Id.* at 89. In keeping with this principle, prosecutors may not challenge

United States Supreme Court held that a prima facie case of impermissible discriminatory use of peremptory challenges is established against the State when a criminal defendant shows (1) that he is a member of cognizable racial group; (2) that the prosecution has used peremptory challenges to strike veniremen of the defendant's race, and; (3) that these facts and other relevant circumstances infer that the prosecution used its peremptory challenges to exclude the veniremen on account of their race.[202] Once the defendant makes a prima facie showing of purposeful discrimination in the prosecutor's use of peremptory challenges, the burden is on the State to come forward with racially neutral explanations for the challenges.[203]

The large majority of 1988 cases involving *Batson* challenges were decided by applying the *Batson* standard to the factual situation in which a black defendant alleged a prosecutor had used his peremptory challenges to keep blacks off of the trial jury. However, the Mississippi Supreme Court did address the application of *Batson* in two other factual situations left unanswered by the United States Supreme Court in its original holding.[204]

In *Britt v. State*,[205] the Mississippi Supreme Court held that *Batson* did not apply to gender based discrimination in the jury selection process.[206] The male defendant in *Britt* was convicted of aggravated assault and argued on appeal that he was denied a fair and impartial

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potential jurors solely on the basis of race. The test enunciated in *Batson* for determining when a prosecutor has impermissibly excluded members of the venire through the discriminatory use of peremptory challenges was adopted by the Mississippi Supreme Court in Williams v. State, 507 So. 2d 50 (Miss. 1987). *See generally 1987 Mississippi Supreme Court Review*, 57 MISS. L.J. 427, 498-505 (1987) (complete discussion of *Batson* and its application to Mississippi).

[202] *Batson*, 476 U.S. at 96-97.

[203] *Id.* at 97. The reasons must be related to the case being tried and cannot include an assumption that jurors would be partial to the defendant because of their shared race. *Id.* at 97-98.

[204] The application of *Batson* to groups other than racial minorities was a question left open by the Supreme Court. Although the Court held that *Batson* applied to racial minorities alleging discrimination, it did not foreclose the possibility that other groups might bring similar actions based on some shared trait or immutable characteristic. Consequently, some jurisdictions have begun to expand *Batson* in different ways. *See, e.g.*, Edmonson v. Leesville Concrete Co., 860 F.2d 1308, 1312 (5th Cir. 1988) (peremptory challenges to jurors in private, civil litigation is state action for equal protection purposes); United States v. Biaggi, 853 F.2d 89, 96 (2d Cir. 1988) (Italian-Americans may be cognizable group under *Batson*). *But see* United States v. Cresta, 825 F.2d 538, 545 (1st Cir. 1987) (young adults do constitute cognizable group under *Batson*).

[205] 520 So. 2d 1377 (Miss. 1988).

[206] *Britt*, 520 So. 2d at 1379.

trial.[207] Britt alleged the prosecution had used its peremptory challenges to systematically exclude men during the jury selection process, thus denying him a fair cross-section of the community on the jury.[208]

In affirming the lower court's denial of a defense motion to empanel a new jury, the Mississippi Supreme Court reasoned that a *Batson* question was not presented in this case.[209] The court acknowledged the defendant's right to a jury selected by non-discriminatory criteria, but relied on *Batson* in noting that the sixth amendment has never been held to require that petit juries must mirror the community.[210] The court indicated that it had found no authority which would bring Britt's claim within the scope of *Batson*.[211]

In another *Batson* case, *Goggins v. State*,[212] the black defendant convicted of armed robbery alleged that the State had improperly used two of its peremptory challenges to systematically exclude blacks from the jury.[213] At trial, during selection of the jury, the defense attorney admitted that he used all of his peremptory challenges to strike whites because they were white.[214]

In response, the prosecutor indicated that he was going to exercise his challenges in a similar fashion, and subsequently struck two black jurors on account of race.[215] The Mississippi Supreme Court reversed and remanded for a new trial, holding that the prosecutor's candid admission that black jurors were excluded on the basis of race showed unequivocally an improper use of peremptory challenges.[216]

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[207] *Id.*

[208] *Id.* However, on appeal, the record did not indicate the names and gender composition of either the jurors ultimately seated or the persons peremptorily challenged off the venire panel. *Id.* at 1379. The lower court, in denying defendant's motion to impanel a new jury, acknowledged that there was a "preponderance" of females on the jury, but found no indication that the jury was "improperly selected or improperly chosen other than by random selection." *Id.*

[209] *Id.*

[210] *Id. See also* Taylor v. Louisiana, 419 U.S. 522, 522 (1975) (no requirement for petit jury to mirror the community).

[211] *Id.* at 1379.

[212] 529 So. 2d 649 (Miss. 1988).

[213] *Id.* at 650.

[214] *Id.* at 651.

[215] *Id.* The final composition of the jury was eleven whites and one black. *Id.* When the State struck the two black jurors, the trial judge required the prosecutor to articulate his reasons for doing so. *Id.* The prosecutor explained that neither of the jurors would look at him directly; one had not fully completed the jury form (she did not fill in the names of her mother and father and how far she lived from the courthouse), and the other "showed an indifferent attitude." *Id.* In explaining his decision, the district attorney said he had relied on information supplied to him during a CLE course that young black men and women as a group would be more favorable toward a defendant. *Id.*

Although not discussed in *Goggins*, the defense attorney's decision to strike the first twelve jurors because they were white[217] may indicate that the Mississippi Supreme Court does not intend to extend the *Batson* test to either defendants or non-racial minorities.

Other cases involving challenges to jury composition were remanded for *Batson* hearings because the State failed to give reasons for the strikes.[218] In two cases, the court declined to remand because the *Batson* test had been met.[219] In both cases, the defendant had not attempted to rebut the prosecutor's explanations when offered the chance.[220]

B. General Challenges

The Mississippi Supreme Court further addressed the issue of the voir dire process in *Harris v. State*[221] and *Brown v. State*.[222] In *Harris*, at the defendant's trial for murder,[223] the attorney for the defense, during voir dire, gave the jurors a detailed explanation of the facts he expected to prove at trial and then asked the jurors if the defendant could "depend upon [them] to bring in a verdict of not guilty."[224]

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[216] *Id.* at 652. *See also* Thomas v. State, 517 So. 2d 1285, 1286 (Miss. 1987) (applying *Batson* standard to Mississippi cases where prosecutor improperly uses peremptory challenges).

[217] *Id.* at 651. Dissenting from the majority, Justice Hawkins believed a neutral explanation sufficient to meet the *Batson* test had been proffered in the case of one of the jurors, and that if the district attorney had based his challenge on an actual study or statistics, then that challenge was proper also. *Id.* at 654-55 (Hawkins, J., dissenting).

[218] *See* Baskins v. State, 528 So. 2d 1120, 1122 (Miss. 1988) (remanded for *Batson* hearing to give State opportunity to enumerate neutral, non-racial explanations for use of peremptory challenges which defendant may then attempt to rebut); Abram v. State, 523 So. 2d 1018, 1019 (Miss. 1988) (same); Dedeaux v. State, 519 So. 2d 886, 888 (Miss. 1988) (same); Jackson v. State, 518 So. 2d 1219, 1218 (Miss. 1988) (same).

[219] *See* Chisholm v. State, 529 So. 2d 653 (Miss. 1988)(*Batson* must be applied retroactively to cases not yet final when *Batson* handed down); Taylor v. State, 524 So. 2d 565, 566 (Miss. 1988)(same).

[220] In both cases, the prosecutor used all but one of his peremptory challenges to exclude blacks. However, in neither case did the defendants attempt to rebut the prosecutor's explanations for the challenges during the *Batson* hearing. In *Chisholm*, the court noted that "several of the purportedly racially neutral reasons here offered for challenges appeared rather specious." *Chisholm*, 529 So. 2d at 636. However, since defense counsel offered no proof to rebut the prosecutor's explanations, the court refused to reverse, holding that even if the reasons offered were "masks for actual racially discriminatory purposes. . . it was incumbent upon Chisholm to come forward with proof when given the opportunity for rebuttal." *Id.* at 639. The court also noted in *Chisholm* that the acceptance of other black persons as jurors could not be used to defend against a *Batson* claim. *Id.* at 637.

[221] 532 So. 2d 602 (Miss. 1988).

[222] 529 So. 2d 537 (Miss. 1988).

[223] *Harris*, 532 So. 2d at 603. Defendant was convicted of murder in the Circuit

In affirming a guilty verdict, the court held that under Rule 5.02[225] of the Uniform Criminal Rules of Circuit Court Practice, "defense counsel . . . had no right to particularize what the facts would show and then ask the jurors if they would return a verdict of not guilty."[226]

In *Brown*, the court for the first time dealt with the issue of whether a juror's failure to respond during the voir dire process which leads to a violation of section 13-5-1[227] of the Mississippi Code may justify a new trial.[228] In that case, during voir dire at Brown's trial for rape, one of the jurors eventually selected to serve failed to respond when asked if she had a case pending in that court.[229] Section 13-5-1 prohibits jurors from serving when they have a case of their own pend-

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Court of Warren County. *Id.*

[224] *Id.* at 605.

[225] Rule 5.02 provides that:

> In the voir dire examination of jurors, the attorney shall direct to the entire venire questions only on matters not inquired into by the court. Individual jurors may be examined only when proper to inquire as to answers given or for other good cause allowed by the court. No hypothetical questions requiring any juror to pledge a particular verdict will be asked.

UNIF. CRIM. R. CIR. CT. PRAC. 5.02 [hereinafter Rule 5.02].

[226] *Id.* In a discussion of Rule 5.02, the court reiterated that attempts to exact a commitment from jurors about how they would decide a particular case were to be condemned. *Id.* The court noted that it is improper for counsel to go beyond the court's inquiries and ask questions not designed to either assure himself that jurors chosen "will give his client the benefit of every right to which [the client] is entitled under the law" or to "reveal or signify particular antipathies that could prejudice his client before any proposed juror." *Id.* at 605 (citing Phenizee v. State, 180 Miss. 146, 178 So. 579 (1938)). While counsel may ask questions designed to aid in the exercise of either challenges for cause or peremptory challenges, the questions should only be designed to "give some measure of the competence or capacity of jurors to decide the issues in the case." *Id.* (citing Murphy v. State, 246 So. 2d 920, 921 (Miss. 1971)). *See also* Derden v. State, 522 So. 2d 752, 754 (Miss. 1988) (district attorney's attempt to determine during voir dire whether jurors would disbelieve testimony of co-conspirator came perilously close to extracting promise from jury not to disbelieve co-conspirator).

[227] Section 13-5-1 provides in part:

> No juror shall serve who has a case of his own pending in that court, provided there are sufficient qualified jurors in the district, and for trial at that time.

MISS. CODE ANN. § 13-5-1 (1972).

[228] *Brown*, 529 So. 2d at 538.

[229] *Id.* The juror, Kathy Maas, had a case pending which was set for trial on the Monday following Brown's trial. *Id.*

ing in the same court.[230] The Mississippi Supreme Court reversed and remanded for a new trial, holding that although violations of the portions of section 13-5-1 dealing with who is competent to serve as a juror will not vitiate a verdict,[231] "the statute . . . unequivocally prohibit[s] services of any juror who has a case pending in that court."[232]

In *Myers v. State*,[233] the court was faced with a situation wherein the juror asked a question of a witness while the witness was explaining an exhibit.[234] In declining to reverse, the court explained that although questioning of this type presents a great potential for prejudice, and will normally be reviewed for prejudice when a judge declines to step in to prevent possible prejudice; in this case no prejudice resulted since the juror did not ask for additional information, but only wanted an answer repeated.[235]

Although not selected for textual discussion, two cases came before the court concerning jury instructions,[236] and one case came before the

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[230] *Id.*

[231] The first part of §13-5-1 sets forth qualifications for jurors such as age, citizenship, literacy, lack of criminal convictions, etc. *Id.*

[232] *Brown*, 529 So. 2d at 540. The court held that a new trial should be granted where the parties stipulate that a juror has served in violation of the statute, even though neither party was aware of the violation during the trial. *Id.* At the same trial, another juror, J. T. Johnson, failed to respond when asked if he or anyone in his family had ever been on the opposite side of a lawsuit from the defense counsel. Johnson failed to mention that the defense attorney had once filed suit against Johnson's son-in-law. *Id.* at 538. In fact, defense counsel was representing Johnson's daughter in a divorce proceeding when he filed suit against her husband, Johnson's son-in-law. *Id.* at 539. Relying on the test set forth in Odom v. State, 355 So. 2d 1381, 1383 (Miss. 1978), which provides for a new trial when prejudice resulting to a defendant could reasonably be inferred from a juror's failure to respond, the court found no reversible error since the question was ambiguous as applied to Johnson, and further, that no prejudice resulted to Brown because even if Johnson had answered in the affirmative he would not have been subject to a challenge for cause. *Id.* at 539.

[233] 522 So. 2d 760 (Miss. 1988). The defendant, John Meyers, was convicted of murder. *Id.* at 761.

[234] *Id.* at 762. The witness, an investigator for the Sheriff's Department was asked, while explaining the various exhibits, what was found under the body. *Id.*

[235] *Id.*

[236] *See* Edlin v. State, 523 So. 2d 42 (Miss. 1988);Derden v. State, 522 So. 2d 752, 754 (Miss. 1988). In *Derden*, the court reiterated that Mississippi law is clear that the testimony of co-conspirators is to be regarded with suspicion and great caution. *Id.* Therefore, it was not error for the court to give a cautionary instruction to this effect to the jury since the State was relying on the testimony of co-conspirators. *Derden*, 522 So. 2d at 754.

In *Edlin*, the court found reversible error in the defendant's conviction for murder when the baliff indicated that the trial judge dealt with a potentially hung jury by instructing the baliff". . . to go back in there and tell them that we had put too much court dealing with polling of the jury.[237]

VIII. DEATH PENALTY

The Mississippi Supreme Court dealt with two cases[238] concerning the application of Mississippi law in light of the United States Supreme Court decision in *Maynard v. Cartwright*[239] which held that the "especially heinous, atrocious, or cruel" aggravating circumstance instruction in a death penalty case is unconstitutionally vague.[240] In *Maynard*, an Oklahoma case, the defendant was convicted of first-de-

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work and time on this case and for them to try again. . . ." *Edlin*, 523 So. 2d at 43. The court held that the instruction violated both Rule 5.03 of the Uniform Criminal Rules of Circuit Court Practice and the procedure set out in Sharplin v. State, 330 So. 2d 591, 596 (Miss. 1976) for giving instructions to a deadlocked jury. *Id.* at 44.

[237] *See* Beyersdoffer v. State, 520 So. 2d 1364 (Miss. 1988). In *Beyersdoffer*, the court reversed the defendant's burglary conviction because the trial judge attempted to clarify a juror's statement during a jury poll following the verdict. *Id.* at 1364. Following the guilty verdict, during a poll of the jury, one juror was asked if guilty was indeed his verdict. He responded "no sir," but indicated that he thought the defendant was guilty of aiding and abetting. However, the juror did not explain whether he found the defendant guilty of aiding and abetting before, or after, the commission of the crime. *Id.* at 1365. The judge interposed: "You mean aiding and abetting while it was going on, is that what you're talking about Mr. Martin?" *Id.* The Mississippi Supreme Court held that when the juror indicated that he did not concur in the verdict, it was reversible error for the trial judge to not immediately send the jury back for further deliberation.

[238] *See* Pinkney v. State, 538 So. 2d 329 (Miss. 1988); Clemons v. State, 535 So. 2d 1354 (Miss. 1988). Although not discussed textually, the court also rendered a decision in Reddix v. State, DP-11 (Miss. Aug. 24, 1988) that the court could determine from a trial record whether the requisites of Emmund v. Florida, 458 U.S. 702 (1982) were met. *Reddik*, Slip op. at 4. In *Emmund*, the United States Supreme Court required that a jury finding of intent to kill was necessary before a death sentence could be carried out. *Emmund*, 458 U.S. at 702. In *Reddix*, the Mississippi Supreme Court held that the evidence reflected in the trial court record met the *Emmund* test and reinstated the death penalty. *Reddix*, slip op. at 5-7.

[239] 108 S.Ct. 1853, 1855 (1988). *Maynard* held that:

> (1) the "especially heinous, atrocious, or cruel" aggravating circumstance was unconstitutionally vague, as it did not offer sufficient guidance to the jury in deciding whether to impose the death penalty; (2) the presence of another, unchallenged, aggravating circumstance did not sustain the death sentence where Oklahoma had no procedure for attempting to save a death penalty when one of several aggravating circumstances was held to be invalid or unsupported by evidence; and (3) the effect of recent decisions of the Oklahoma Court of Criminal Appeals limiting the aggravating circumstances to cases in which torture or serious physical abuse was present was to be decided in the first instance by state courts.

108 S.Ct. at 1853-54.

[240] *Id.* at 1855.

gree murder and sentenced to death under the state's death penalty statute.[241] The death sentence was imposed by the jury after it found the evidence to show the existence of two aggravating circumstances as defined by the statute. These were: (1) the circumstance "that the murder was 'especially heinous, atrocious, or cruel'," and (2) the circumstance that "the aggravating circumstances outweighed the mitigating evidence in the case."[242] Eventually, the United States Court of Appeals for the Tenth Circuit, sitting en banc, found that the "especially heinous, atrocious, or cruel" circumstance was unconstitutionally vague under the eighth amendment's cruel and unusual punishment clause.[243]

In *Clemons v. State*[244] and *Pinkney v. State*,[245] the Mississippi Supreme Court held that the identical instruction was not unconstitutional under Mississippi law for several reasons.

In *Clemons*, the defendant, Chandler Clemons, was convicted of capital murder in the shooting death of a pizza delivery man.[246] The jury imposed the death penalty after finding the presence of two aggravating circumstances.[247] Although no objection was made to the "especially heinous" instruction, the court, in light of *Maynard* and section 99-19-105 of the Mississippi Code, considered the issue anyway.[248] In affirming the death penalty given to Chandler, the court distinguished the Mississippi case from *Maynard* in two ways. First, the court reasoned that unlike Mississippi, Oklahoma "had no procedure for addressing the correctness of a death penalty when one of several aggravating circumstances found by the jury was held to be invalid or unsupported by evidence."[249] The court reasoned that even if the "especially heinous" instruction were invalid, it (the Mississippi Supreme Court) had consistently held through the years that where a finding is made of more than one aggravating circumstance, and one of them is found to be invalid, "a remaining valid aggravating circumstance will nonetheless support the death penalty verdict."[250]

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[241] *Id.*

[242] *Id.*

[243] *Id.* at 1857. The appeals court held that it was unconstitutionally vague because it allowed application of the circumstance based on all the facts of a case. *Id.*

[244] 535 So. 2d 1354 (Miss. 1988).

[245] 538 So. 2d 329 (Miss. 1988).

[246] *Clemons*, 535 So. 2d at 1355.

[247] *Id.* at 1361-62. The lower court granted the State a jury instruction which stated:

> Consider only the following elements, if any, of aggravation in determining whether the death penalty should be imposed: (1) the Capital offense was committed while the defendant was engaged in the commission of robbery and was committed for pecuniary gain; (2) the Capital Offense was especially heinous, atrocious, or cruel.

Id. at 1361.

[248] *Id.* at 1362. Section 99-19-105 sets forth the court's responsibility for review of death penalty cases. The section provides in part:

> (1) whenever the death penalty is imposed, . . . the sentence shall be reviewed . . . on the record by the Mississippi Supreme Court.
>
> (2) The Mississippi Supreme Court shall consider the punishment as well as any errors enumerated by way of appeal.
>
> (3) With regard to the sentence the court shall determine. . . (b) whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Section 99-19-101.

MISS. CODE ANN. § 99-19-105 (Supp. 1988).

Additionally the court found that, unlike Oklahoma, Mississippi had placed a limiting construction on the "especially heinous" instruction and was therefore not in violation of the portion of *Maynard* holding that the instruction was invalid because lack of a limiting construction gave a jury "unchallenged discretion."[251] The court noted that in at least two cases[252] it had placed a limiting construction on the instruction which was implicitly recognized by the *Maynard* court.[253]

In *Pinkney*, the court upheld a death penalty sentence imposed on the defendant[254] after consideration of two aggravating circumstances, one of which was the "especially heinous" circumstance.[255] In *Pinkney*, however, the court found the "especially heinous" circumstance to be an invalid aggravating circumstance, but upheld the sentence because the other aggravating circumstance, burglary, was valid.[256] The court did hold, however, that in the future, "capital sentencing juries of the State should and must be specifically instructed about the elements which may satisfy the aggravating circumstance of "especially heinous, atrocious, or cruel."[257] This holding may, in part, have been in response to a strong dissent put forth by Justice Robertson in *Clemons* (and echoed in *Pinkney*).

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[249] *Id.* In Oklahoma, if one aggravating circumstance were found to be invalid, the court would simply change the death sentence to life imprisonment. *Id.* There was no chance to cure consideration of an invalid aggravating circumstance on appeal. *Id.* (citing *Maynard*, 108 S.Ct. at 1860).

[250] *Id. See* Zant v. Stephens, 462 U.S. 862 (1983); Edwards v. Scorggy, 849 F.2d 204 (5th Cir. 1988); Evans v. Thigpen, 809 F.2d 239 (5th Cir. 1987); Nixon v. State, 533 So. 2d 1078 (Miss. 1987); Lockett, v. State, 571 So. 2d 1317, 1336 (Miss. 1987); Edwards v. State, 441 So. 2d 84, 92 (Miss. 1983).

[251] *Clemons*, 535 So. 2d at 1363.

[252] *See* Coleman v. State, 378 So. 2d 640 (Miss. 1979) (court adopted limiting construction found in Spinkellink v. Wainwright, 578 F.2d (5th Cir. 1978) of "crime which is unnecessarily torturous to the victim.") In Evans v. State, 422 So. 2d 737 (Miss. 1982), the Mississippi Supreme Court limited the "especially heinous" instrucion to cases where "mental torture and aggravation" were inflicted on the victim. *Id.* at 743. *See also* Billiot v. State, 454 So. 2d 445, 464-65 (Miss. 1984) (approved *Coleman* elaboration).

[253] *Clemons*, 535 So. 2d at 1363-64. The Mississippi Supreme Court relied on language in *Maynard* stating that:

> We also do not hold that some kind of torture or serious physical abuse is the only limiting construction of the heinous, atrocious, or cruel aggravating circumstances that would be constitutionally acceptable.

Id. at 1364 (quoting *Maynard*, 108 S.Ct. at 1859-60).

[254] *Pinkney*, 538 So. 2d at 330. The defendant, Bobby Joe Pinkney, was convicted of capital murder and sentenced to death for the beating death of Tracey Hickman. *Id.* at 333.

[255] *Id.* at 355. The other circumstance was commission ofthe crime of burglary. *Id.*

In *Clemons*, Justice Robertson reasoned that the limiting construction placed on the "especially heinous" instruction by the Mississippi court could not be relied upon to uphold the sentence because the jury was never informed about the limits of the instruction.[258] He argued additionally, that the other circumstance could not be relied upon to uphold the sentence because it was not the role of the court to decide that the jury might have relied upon the second circumstance standing alone.[259]

In a brief dissent from the sentencing phase of the trial in *Pinkney*, Justice Robertson argued for reversal of the death sentence based on the reasons set forth in his dissent in *Clemons*.[260]

IX. JURY INSTRUCTIONS

Although not selected for textual treatment, in the area of jury instructions, the Mississippi Supreme Court considered cases involving lesser included offenses,[261] jury nullification,[262] acquittal instruction if engaged in illegal conduct,[263] self-defense,[264] and the fact that the terms "implied" and "inferred" are legally synonymous.[265]

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[256] *Id.*

[257] *Id.* at 357.

[258] *Clemons*, 535 So. 2d at 1368 (Robertson, J., dissenting). Justice Robertson noted that "it may be fairly said that since *Coleman* we have consistently ignored its teaching . . . *Cartwright* teaches that *Coleman* is not worth the paper it is written on if it isn't communicated to the sentencing jury, and it wasn't here." *Id.*

[259] *Id.* at 1371.

[260] *Pinkney*, 538 So. 2d at 361 n.1 (Robertson, J., dissenting). Justice Robertson concurred in finding Pinkney guilty of capital murder, but urged reversal of the death sentence and remand for a new trial on the matter of sentence only. *Id.*

[261] *See* Griffin v. State, 533 So. 2d 444, 447 (Miss. 1988) (even where defense to charge of rape is consent, reversible error to refuse lesser included offense instruction of simple assault).

[262] *See* Davis v. State, 520 So. 2d 493, 494 (Miss. 1988) (no right to jury nullification instruction).

In *Nicholau v. State*,[266] the court addressed the issue of giving supplemental instructions to the jury after it had retired. The court in *Nicholau* reversed and remanded a capital murder conviction where the trial judge gave the jury a supplemental instruction after retirement which defined "malice aforethought."[267] The court observed that it was "unnecessary and unwise for the circuit court to attempt to define 'malice' in jury instructions."[268] The court further stressed that whenever a judge gives supplemental instructions to a jury after it retires to consider its verdict, he must be very careful in selecting his words so as not to confuse the jury.[269] In *Nicholau*, reversible error was committed because the malice definition was ambiguous and could only have confused the jury.[270]

In *Hailey v. State*,[271] the court clarified its 1985 opinion in *McBrayer v. State*[272] in which it was held that the statutory rape provision of section 97-5-21 of the Mississippi Code would not be subsumed into the child fondling statute.[273] Following *McBrayer*, uncertainty arose as to whether fondling of a child would be a lesser included offense of statutory rape. The issue arose in *Hailey* when the defendant was indicted for the alleged rape of a thirteen year-old girl, but was convicted of child fondling on the basis of a lesser included offense instruction.[274] The court reversed and remanded Hailey's conviction of child fondling because the indictment failed to inform Hailey of the charge of fondling. The court reasoned that since the indictment was for rape and since child fondling was not a necessarily included offense of rape, then under Rule 2.05 of the Uniform Criminal Rules of Circuit Court Practice, the indictment had not sufficiently notified Hailey of the nature and cause of the accusation against him.[275]

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[263] *See* O'Bryant v. State, 530 So. 2d 129, 133 (Miss. 1988) (no right to ask for acquittal instruction where individual engaged in illegal conduct with loaded pistol which resulted in accidental death of another).

[264] *See* Stoop v. State, 531 So. 2d 1215, 1219 (Miss. 1988) (reversal warranted where almost identical jury instructions were contradictory and forced jury to decide which of instructions correctly portrayed law).

[265] *See* Taylor v. State, 536 So. 2d 1326, 1328 (Miss. 1988) (inferred and implied are legally synonymous terms where conspiracy may be either inferred or implied from proof).

[266] 534 So. 2d 168 (Miss. 1988).

[267] *Id.* at 174. This was in response to some questions submitted to the court by the jury asking the judge to further define "malice aforethought:" and "beyond a reasonable doubt." *Id.* The judge declined to elaborate further on the "reasonable doubt" instruction. *Id.*

[268] *Id.* (citing Smith v. State, 237 Miss. 626, 114 So. 2d 676 (1959)).

[269] *Id.* at 175.

[270] *Id.* at 174. The court found error in the definition by stating that the definition first states that "malice aforethought exists where the person doing the act which causes the death has *an intention* to cause death or *grievous bodily harm* to any person." *Id.* The court found this to be in error because "an essential element of the crime of murder is the felonious and premeditated intent to kill, not simply to do grievous bodily harm." *Id.* (citing Pitts v. State, 241 So. 2d 668 (Miss. 1970)).

[271] 537 So. 2d 411 (Miss. 1988).

[272] 467 So. 2d 647 (Miss. 1985).

[273] *McBrayer*, 467 So. 2d at 648.

X. Right to Counsel

Although not selected for textual comments, the court decided a number of cases where ineffective assistance of counsel was alleged.[276] The right to counsel at pre-indictment line-ups was addressed in two cases, *Livingston v. State*[277] and *Jimpson v. State*.[278] Following his conviction on the charge of rape, the defendant in *Livingston* argued on appeal that his sixth amendment right to counsel had been violated because he was not provided with counsel at his pre-indictment line-up.[279] While acknowledging that the right to counsel may attach to pre-indictment line-ups in Mississippi,[280] the court held that such an error would not be entertained when raised for the first time on appeal, particularly in the absence of an affirmative showing in the record indicating that counsel was not present at the line-up.[281] In *Jimpson*, the court refused to reverse a life sentence where the defendant was denied assistance of counsel at a line-up.[282]

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[274] *Hailey*, 537 So. 2d at 412.

[275] *Id.* at 413.

[276] *See* Reed v. State, 536 So. 2d 1336, 1338 (Miss. 1988) (two-prong *Strickland* test will be applied in deciding whether professional errors have occurred and whether prejudice has resulted); Corly v. State, 536 So. 2d 1314, 1317 (Miss. 1988) (although right to counsel attaches when defendant is accused of crime, no error in delay of appointment unless defendant can show adverse effect); Yarbrough v. State, 529 So. 2d 659, 661 (Miss. 1988) (*Strickland* test violation occurs where defense attorney fails to conduct independent investigation of case); Cabello v. State, 524 So. 2d 313, 316 (Miss. 1988) (inexperience alone will not, as a matter of law, make counsel ineffective, since counsel is presumed competent until proven otherwise); Byrd v. State, 522 So. 2d 756, 759 (Miss. 1988)(defendant will not be entitled to continuance to substitute retained counsel where counsel's conduct does not fall below *Strickland* standard); Reynolds v. State, 521 So. 2d 914, 918 (Miss. 1988) (when defendant challenges his guilty plea on grounds of ineffective assistance of counsel, unprofessional errors of substantial gravity must be shown).

[277] 519 So. 2d 1218 (Miss. 1988).

[278] 532 So. 2d 985 (Miss. 1988).

[279] *Livingston*, 519 So. 2d at 1220.

[280] *Id.* at 1220-21. *See* Page v. State, 495 So.2d 436 (Miss. 1986)(attachment of right to counsel); Cannaday v. State, 455 So. 2d 713 (Miss. 1984)(same).

[281] *Livingston*, 519 So. 2d at 1221.

The right to counsel also arose in the contest of voluntary confessions in two cases heard by the court in 1988.[283] In *Burnside v. State*[284] the defendant's conviction for rape was reversed and remanded because the State did not meet its burden of proving that the defendant's confession was voluntary.[285] The court stated that under prior case law, the State has the burden of proving a confession is voluntary.[286] The burden may be met by the testimony of an officer, or someone else with knowledge of the facts, that no coercion was used or threats made in obtaining the confession.[287] If the defendant then puts on evidence or testifies that violence or threats of violence induced the confession, then the State must offer all the officers who were present when the accused was questioned and when the confession was signed or give a reason for the absence of such witnesses.[288] In *Burnside*, the court reversed because the State failed to produce two witnesses to the confession and further failed to explain their absences.[289]

In *Minnick v. State*[290] the court affirmed a death sentence where the defendant knowingly waived his sixth amendment rights to counsel.[291] In that case, the defendant, Robert Minnick, invoked his fifth amendment right and met with his appointed counsel who told Minnick not to speak to anyone else about the charges against him.[292] Subsequent to this meeting, Minnick met with a deputy sheriff and gave a confession without the presence of his attorney.[293] Based on the facts presented and the initial meeting with the court-appointed counsel, the court found no error below and held that a knowing waiver of rights had taken place.[294] Dissenting from the majority, Justice Robertson stated that the rule in civil cases, that a lawyer is forbidden to communicate with the opposing party who has a lawyer without that lawyer being present, should be extended to criminal cases as well.[295]

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[282] *Jimpson*, 532 So. 2d at 989. The doctrine was first recognized in Chapman v. California, 386 U.S. 18 (1967) and stands for the proposition that some constitutional errors are so unimportant in the setting of a particular case that automatic reversal of a conviction is not warranted. *Chapman*, 386 U.S. at 21.

[283] *See* Burnside v. State, 537 So. 2d 420, 424 (Miss. 1988) (State must meet burden of proving voluntariness of confession or reversal warranted); Minnick v. State, No. DP-79 (Miss. Dec. 14, 1988) (guilty verdict upheld where defendant made concious decision to relinquish right to cousnel).

[284] 537 So. 2d 420 (Miss. 1988).

[285] *Id.* at 424.

[286] *Id.* (citing Agee v. State, 185 So. 2d 671 (Miss. 1966).

[287] *Id.* This makes out a prima facie case for the State on the question of voluntariness. *Id.*

[288] *Id.*

[289] *Id.*

[290] No. DP-79 (Miss. Dec. 14, 1988).

[291] Slip op. at 10-11.

[292] *Id.* at 7-8.

[293] *Id.* at 10.

XI. SENTENCING

The Mississippi Supreme Court rendered opinions in several cases concerning the sentencing of a criminal defendant.[296] In *Huntley v. State*,[297] the court addressed the issue of whether, under the state's habitual offender statutes,[298] time served in a county jail is the equivalent of time served in a state or federal penal institution.[299] As required by the habitual offender statute, prior to his conviction of receiving embezzled funds, Huntley had served two separate terms in state prison.[300] His first term was in Parchman and exceeded one year.[301] However, he began serving his second term in the Harrison County Jail on July 12, 1979 and was transferred to Parchman on June 23, 1981 where he remained until June 5, 1982.[302] The court cited section 47-5-112(1) of the Mississippi Code for the proposition that any person sentenced or placed under the custody of the department of corrections may serve all or part of his sentence in a county jail.[303] Further, the court mentioned section 47-5-703 of the Mississippi Code which defines "prison system" as "[t]he prisons operated by the Mississippi Department of Corrections and in those local or county jails or other facilities authorized to house state inmates."[304] The Mississippi Supreme Court affirmed Huntley's conviction, concluding that based on the cited authority the legislature obviously intended the time served in a county or local jail to count towards the imprisonment term provided for in the sentence.[305]

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[294] *Id.* at 12.

[295] *Id.* (Robertson, J. dissenting).

[296] *See* Powell v. State, 536 So. 2d 13, 17 (Miss. 1988)(involving restitution by criminal defendant); Arnett v. State, 532 So. 2d 1003, 1012 (Miss. 1988)(conditioning seven years of defendant's sentence on payment of fine held improper); Garlotte v. State, 530 So. 2d 693, 694 (Miss. 1988)(commendable procedure for circuit court to file transcript of guilty plea within days of summary disposition); Harris v. State, 527 So. 2d 647, 651 (Miss. 1988)(sentencing under habitual offender statute mandatory if defendant falls within the statutory provisions); King v. State, 527 So. 2d 641, 645 (Miss. 1988)(serving one year on concurrent sentences for different convictions of separate crimes amounted to serving more than one year on each sentence under habitual offender statute); Neal v. State, 525 So. 2d 1279, 1284 (Miss. 1988)(not error, in capital case, if instructions to jury are general, all inclusive with regard to mitigating factors); Huntley v. State, 524 So. 2d 572, 574 (Miss. 1988)(under habitual offender statute, time served in county jail is equivalent to time served in state or federal prison); Aldridge v. State, 524 So. 2d 330, 331 (Miss. 1988)(defendant who has not been disadvantaged by Post Conviction Relief Act has no standing); Carter v. State, 524 So. 2d 324, 325 (Miss. 1988)(sentence of delinquent child was held indefinite, since trial court retained right to change sentence prior to completion of term); Jones v. State, 523 So. 2d 957, 960 (Miss. 1988)(State must inform defendant, in indictment, that he is being tried as habitual offender); Clowers v. State, 522 So. 2d 762, 764-65 (Miss. 1988)(trial court may properly reduce mandated sentence through proper exercise of constitutional principles of proportionality); State v. Bradford, 522 So. 2d 227, 228 (Miss. 1988)(inmate who escapes after being assigned to leave jail may be given lesser sentence of six months for escape); Childs v. State, 521 So. 2d 882, 883 (Miss. 1988)(evidence sufficient to support verdict of negligently killing another while under influence of liquor); Ellis v. State 520 So. 2d 495, 496 (Miss. 1988)(state constitutional double jeopardy provision prohibited new sentencing hearing as to habitual offender requirements); Craig v. State, 520 So. 2d 487, 492 (Miss. 1988)(defendant convicted of manslaughter by culpable negligence in operation of motor vehicle); Holliday v. State, 519 So. 2d 1226, 1226 (Miss. 1988)(application for post-conviction relief deficient); Cowart v. State, 519 So. 2d 896, 897 (Miss. 1988)(plea-bargained guilty plea to assault with intent to rape is lesser included constituent offense under indictment for forcible rape).

[297] 524 So. 2d 572 (Miss. 1988).

[298] *Huntley*, 524 So. 2d at 573. Mississippi has two habitual offender statutes. Under

A form of sentencing that may violate the equal protection clause of the fourteenth amendment of the United States Constitution was addressed in *Arnett v. State*.[306] Joseph Junior Arnett was convicted of possession of more than a kilogram of marijuana and sentenced to fourteen years imprisonment with seven years suspended if he paid a

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Miss. Code Ann. § 99-19-81 (Supp. 1988) a person who is convicted of a felony and has also been convicted of two previous felonies or federal crimes on charges which arose out of separate incidents separately brought, and who was sentenced to separate terms of one year or more in any state and/or federal prison shall receive the maximum sentence without possibility of parole or probation. Miss. Code Ann. § 99-19-83 (Supp. 1988) is substantially similar to the aforementioned statute, except that the person must have been sentenced and served one or more years for the previous felonies and life imprisonment must be imposed if one of the felonies was a crime of violence.

[299] *Huntley*, 524 So. 2d at 574. Johnny Lee Huntley was convicted of receiving embezzled funds and sentenced to serve life imprisonment without parole under Miss. Code Ann. § 99-13-83 (Supp. 1988). *Huntley*, 524 So. 2d at 573.

[300] *Huntley*, 524 So. 2d at 574.

[301] *Id.*

[302] *Id.* Huntley spent approximately eleven months at Parchman during his second term. *Id.*

[303] *Id.*

[304] *Id.* The court also stated that in construing the habitual offender statutes consideration must be given to the purpose of the statute, and the intent of the legislature in enacting it. *Id.*

[305] *Id.*

[306] 532 So. 2d 1003 (Miss. 1988).

$125,000 fine.[307] Arnett argued that conditioning the suspension of his sentence upon the payment of a fine violated the equal protection clause of the fourteen amendment.[308] The Mississippi Supreme Court affirmed the conviction, but remanded for proper sentencing, holding that it was error to condition seven years of Arnett's sentence upon payment of a fine.[309] The court reasoned that under *Payne v. State*,[310] the sentence was indefinite and, therefore, not in line with section 47-7-33[311] of the Mississippi Code because it allowed the trial court to suspend the sentence at any time prior to the completion of the term.[312]

The case of *Jones v. State*[313] confronted the issue of giving a criminal defendant notice that he is to be tried as a habitual offender for possession with the intent to distribute a controlled substance.[314] Doubling the statutory sentence, the trial court sentenced Jones to sixty years without the possibility of parole.[315] On appeal, Jones argued that the indictment was flawed in that the State sought a habitual offender sentence.[316] The Mississippi Supreme Court cited *Bandy v. State*[317] for the proposition that the indictment must do more than list previous convictions, it must inform the defendant that he is being tried as a habitual offender.[318] However, the court stated that in making a motion in limine and a motion for a continuance, the appellant explained that if convicted, he could be given enhanced sentencing.[319] The Mississippi Supreme Court held that even though the habitual offender language was not in the indictment, there was no error since Jones had actual notice that the State would ask for sentencing under the habitual offender statutes.[320]

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[307] *Arnett*, 532 So. 2d at 1007.

[308] *Id.* at 1012.

[309] *Id.*

[310] 462 So. 2d 902 (Miss. 1984). *Payne* involved a similar sentence of seven years with two years suspended upon the payment of a fine. *Id.* at 904. The Mississippi Supreme Court stated that the equal protection issue was premature since there was no finding of indigency. *Id.* However, the court did remand for resentencing, finding that the sentence was not definite. *Id.* at 906.

[311] Miss. Code Ann. § 47-7-33 (1972). Section 47-7-33 allows the suspension of a sentence, but forbids the suspension after the defendant has begun to serve the sentence. *See* Denton v. Maples, 394 So. 2d 895, 898 (Miss. 1985)(under § 47-7-33 suspension can only be made immediately after conviction or plea of guilty).

[312] *Arnett*, 532 So. 2d at 1012.

[313] 523 So. 2d 957 (Miss. 1988).

[314] *Jones*, 523 So. 2d at 958.

[315] *Id.* The trial judge doubled the statutory sentence of thirty years because Jones was a subsequent offender under Miss. Code Ann. § 41-29-147 (1972), and denied the possibility of parole since Jones was a habitual offender within the meaning of Miss. Code Ann. § 99-19-81 (Supp. 1988). *Jones*, 523 So. 2d at 958.

[316] *Jones*, 523 So. 2d at 960. The State argued that it had met all the requirements of Rule 6.04 of the Uniform Criminal Rules of Circuit Court Practice which requires the indictment to include both the principle charge as well as a charge and description of previous felonies. *Id.* at 960.

[317] 495 So. 2d 486 (Miss. 1986).

[318] *Jones*, 523 So. 2d at 960.

XII. Elements of a Crime

In several cases the Mississippi Supreme Court discussed the elements of certain crimes.[321] One of these cases was *Pruitt v. State*.[322] John Richard Pruitt was found guilty of attempted rape, and was sentenced to ten years imprisonment.[323] On appeal, Pruitt argued that the trial court erred in not granting his motion for a directed verdict, since he had abandoned his attempt to rape his victim.[324] The Mississippi Supreme Court stated that the crime of attempt has three elements: 1) an intent to commit a certain crime; 2) an ineffectual act done toward its commission; and 3) failure to consummate its commission.[325] The court held that Pruitt had done everything needed to constitute an attempt.[326] However, it was concluded that Pruitt had abandoned his intent to rape his victim, since he had told her that she was free to go and that he did not touch her after he released her.[327] The Mississippi Supreme Court accordingly reversed, holding that there was not sufficient evidence to show that Pruitt had not abandoned his attempt to rape his victim.[328]

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[319] *Id.*

[320] *Id.*

[321] *See* Wheeler v. State, 536 So. 2d 1347, 1352 (Miss. 1988) (proof of other crimes is admissible where offense charged is so interrelated with that offered to be proved that two constitute single transaction or occurrence); Flurry v. State, 536 So. 2d 1340, 1341 (Miss. 1988)(premises upon which contraband is found should be in exclusive control of accused, absent some evidence connecting him with contraband); Moore v. State, 534 So. 2d 557, 559-60 (Miss. 1988)(when defendant claims entrapment, trial court should look at inducement by State as well as defendant's predisposition); Henderson v. State, 534 So. 2d 554 (Miss. 1988)(evidence did not support defendant's conviction for obtaining money under false pretenses); Hartfield v. State, 532 So. 2d 1237, 1239 (Miss. 1988)(testimony of co-perpetrators was admissible at trial for uttering as it was direct evidence not evidence of other criminal activity); Monk v. State, 532 So. 2d 592, 599 (Miss. 1988)(to prove felonious child abuse, pattern of abuse not required); Rowland v. State, 531 So. 2d 627, 630 (Miss. 1988)(elements of forgery); King v. State, 530 So. 2d 1356, 1358-1359 (Miss. 1988)(prima facia case for defense of entrapment); Davis v. State, 530 So. 2d 694, 702 (Miss. 1988) (gun as deadly weapon); Pruitt v. State, 528 So. 2d 828 (Miss. 1988)(abandonment of attempt to rape); Banks v. State, 525 So. 2d 399, 401 (Miss. 1988)(police officer may make felony arrest, as long as he has reasonable grounds to believe that suspect committed offense); Smith v. State, 523 So. 2d 1028, 1030 (Miss. 1988)(peremptory instruction request sufficient to raise issue of lack of proof to support conviction); Kemp v. State, 518 So. 2d 656, 660 (Miss. 1988)(reverse drug sale embraces all elements of entrapment).

[322] 528 So. 2d 828 (Miss. 1988).

[323] *Pruitt*, 528 So. 2d at 829. The alleged attempted rape took place at Terry's Lounge in Gulfport. *Id.* The evidence showed that Pruitt entered the ladies' room, seized Robin Gatlin by the throat and told her to take off her clothes or he would beat her face in with his motorcycle helmet. *Id.* Gatlin immediately began to talk to Pruitt and he took his hand from her throat. *Id.* Pruitt told Robin that she was free to go, but she was afraid to walk past him. *Id.* The two went out into the bar where Robin sat next to Pruitt for a short period of time before sitting with a woman that she had told Pruitt was her neighbor.*Id.*

In *Rowland v. State*[329] the Mississippi Supreme Court addressed the elements of the crime of forgery. Rowland forged a Certificate of Incorporation, bearing the seal of the Secretary of State, in order to induce Sam Scarbrough to part with $17,500 for his supposed part of a Taco Bell franchise.[330] Rowland was convicted in the Circuit Court of Tate County for the forgery of the Secretary of State's seal, and sentenced to fifteen years as a habitual offender.[331] On appeal, it was contended that the State had failed to make a jury question on forgery.[332] The court explained that to show forgery three things must exist: 1) an instrument must be falsely made or altered, in writing; 2) there must be fraudulent intent; and 3) the instrument must appear to be capable of effecting a fraud.[333] The court concluded that the elements of forgery were clearly present, in that the seal was proven false, that the intent in using the seal was to defraud Scarbrough, and the seal was actually used to defraud Scarbrough.[334]

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[324] *Id.* at 830.

[325] *Id. See* Edwards v. State, 500 So. 2d 967, 969 (Miss. 1986)(attempted robbery).

[326] *Id.* at 830-31. The court explained that Pruitt had announced his intent to rape Ms. Gatlin. *Id.* The court also explained that there was an overt act toward the commission of rape when Pruitt grabbed the victim by the throat threatening to beat her up if she did not take off her clothes. *Id.* at 831.

[327] *Id.* at 831. It was stated that in order for Pruitt to abandon his intent he must have voluntarily abandoned his intent without resistance of the victim or the intervention of a third party. *Id.*

[328] *Id.*

[329] 531 So. 2d 627 (Miss. 1988).

[330] *Rowland*, 531 So. 2d at 628.

[331] *Id.* at 629. Rowland was charged pursuant to MISS. CODE ANN. § 97-21-47 (1972), which provides for a forgery conviction for anyone who forges or counterfeits the seal of any public office with the intent to defraud.

[332] *Rowland*, 531 So. 2d at 630.

[333] *Id. See* State v. Ellis, 161 Miss. 361, 137 So. 102, 103 (1931)(involving forged marriage license). The *Rowland* court also explained that the alleged forged writing must be one which, if genuine, may injure another. *Rowland*, 531 So. 2d at 630.

Mississippi law regarding the entrapment defense has become confusing over the years through several cases. The Mississippi Supreme Court made an attempt to clear up some of this confusion in *Moore v. State.*[335] Law enforcement agents sold a forty-pound bale of marijuana to Luke Moore, and then arrested him for possession with intent to sell.[336] Moore was sentenced to twenty-four years imprisonment and ordered to pay a $40,000 fine.[337] Moore contended that since the State provided the marijuana, that he, as a matter of law, was entrapped.[338] The Mississippi Supreme Court stated that there is entrapment when law enforcement authorities induce a person to commit a crime he was not predisposed to commit otherwise.[339] The court also explained that evidence of predisposition is always relevant and admissible where entrapment is pled as a defense.[340] When a defendant claims entrapment, the trial court should first look to whether the crime was induced by the State; and secondly to the defendant's predisposition to commit the crime.[341] It is left up to the trier of fact to weight the State's involvement against the defendant's predisposition.[342] On the issue of State involvement, the court stated that law enforcement participation can become so intrusive that the only remedy is to let the defendant go free even if he had the predisposition to commit the crime.[343] The Mississippi Supreme Court held that Moore was ready, willing and able to buy the marijuana, suggesting that he had a substantial predisposition, and that the inducement by the State was slight.[344]

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[334] *Rowland*, 531 So. 2d at 630.

[335] 534 So. 2d 557 (Miss. 1988).

[336] *Moore*, 534 So. 2d at 557. The State had an informant offer the marijuana to Moore and then set up a time for him to pick up and pay for the marijuana. *Id.* at 558. At the time of the meeting Mississippi Bureau of Narcotics' agents were present to arrest Moore. *Id.*

[337] *Id.* at 557.

[338] *Id.* at 558.

[339] *Id.*

[340] *Id. See* Sayer v. State, 533 So. 2d 464, 466 (Miss. 1988)(evidence of defendant's prior drug trafficking in marijuana admissible where entrapment defense is raised in subsequent prosecution for selling marijuana).

[341] *Moore*, 534 So. 2d at 559. The court explained that previous law had drawn a distinction between cases involving the defendant's predisposition, and the misconduct of law enforcement officials. *Id.*

[342] *Id.* Where there is weak evidence of the defendant's predisposition and heavy State involvement, the entrapment defense should be sustained. *Id.* at 560. However, the court explained, substantial State involvement may be overcome, where there is powerful evidence of predisposition. *Id.*

[343] *Id.* The defendant must be freed if the inducement is such that criminal offense will be created by those other than the accused. *Id.* The defendant should also be discharged where the State's conduct is outrageous or shocking. *Id.*

XIII. CONFESSIONS

The Mississippi Supreme Court addressed the issue of the admissibility of confessions of individuals held under youth court jurisdiction in *Smith v. State*.[345] Statie Smith, a sixteen year old, was arrested on charges of burglary, resisting arrest, and assault upon a law enforcement officer, incident to his arrest as a rape suspect.[346] Two days later the Youth Court appointed counsel and authorized a criminal investigator to question Smith if one of his parents was present.[347] Later that same day Smith and his mother waived Smith's *Miranda* rights, then Smith confessed to the rape in the presence of the investigator and his mother.[348] After his conviction for rape,[349] Smith appealed, asserting that the confession was secured in violation of the Youth Court Act,[350] and was thus inadmissible since the investigator knew Smith had counsel but did not notify him or obtain his consent.[351] The Mississippi Supreme Court affirmed the circuit court's admission of the confession, holding that "notwithstanding the interrogating officer's knowledge that the defendant had counsel, the interrogation did not violate section 43-21-311(4) of the Mississippi Code."[352] In dictum, however, the court stated that where no guardian ad litem has been appointed it would be better practice to secure the consent or presence of counsel.[353]

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[344] *Id.*

[345] 534 So. 2d 194 (Miss. 1988).

[346] *Smith*, 534 So. 2d at 195. Law enforcement officers attempted to arrest Smith as a rape suspect, but in the course of the arrest Smith became frightened, pulling a gun and assaulting one of the officers. *Id.*

[347] *Id.*

[348] *Id.* Smith called Investigator Kenneth Dickerson to his cell telling him that he wanted to make a statement. *Id.* No one contacted Smith's court-appointed attorney, Kizer Jones. *Id.*

[349] *Id.* Smith was convicted of rape in the Circuit Court of Marshall County and sentenced to a term of twenty years. *Id.*

[350] *Id.* Specifically, Smith claimed that his confession was allowed in violation of MISS. CODE ANN. § 43-21-311(4)(Supp. 1986) which provides that:

> Except for the child's counsel, guardian and litem and authorized personnel of the youth court, no person shall interview or interrogate the child held in a detention or shelter facility unless approval therefor has first been obtained from the judge or his designee. When a child is in a detention or shelter facility is represented by counsel or has a guardian ad litem, no person may interview or interrogate the child concerning the violation of a state or federal law, or municipal or county ordinance by the child unless in the presence of his counsel or guardian ad litem or with their consent.

Smith, 534 So. 2d at 196 (citing MISS. CODE ANN. § 43-21-311(4) (Supp. 1986).

[351] *Smith*, 534 So. 2d at 195.

The Mississippi Supreme Court discussed long standing policy concerning the admissibility of confessions in *Chisolm v. State*.[354] Rickey Chisolm was found guilty of armed robbery and was sentenced to thirty years in the custody of the Mississippi Department of Corrections.[355] Chisolm asserted that the trial court erred in admitting his confession into evidence.[356] Scott County Sheriff Glen Warren testified that Chisolm was informed of his rights, then voluntarily confessed in the presence of Deputy Sheriff Reed and himself.[357] Deputy Reed corroborated Warren's testimony, specifically stating that Chisolm was aware of the charge against him prior to making his confession.[358] Chisolm testified that he was unable to read and write and that he was not informed of the charge against him until the day he confessed.[359]

The Mississippi Supreme Court began its discussion by stating that a confession must be given voluntarily and freely, without promises or threats.[360] Citing *Agee v. State*[361] the court explained that the State's burden of proving voluntariness of a confession may be met by the testimony of a police officer, or another with knowledge of the facts, that the confession was voluntary.[362] The court held that the finding that Chisolm's confession was voluntary and that he had made a competent waiver of his privilege against self-incrimination was supported by substantial evidence.[363]

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[352] *Id.* at 196. *See* In Interest of W.R.A., 481 So. 2d 280 (Miss. 1985)(where defendant was questioned, as in instant case, but neither he nor his mother informed officers that he had counsel).

[353] *Smith*, 534 So. 2d at 196.

[354] 529 So. 2d 630 (Miss. 1988).

[355] *Chisolm*, 529 So. 2d at 632. Chisolm was charged and found guilty of the October 8, 1984 armed robbery of 70 year-old Verner Lee Gatewood. *Id.*

[356] *Id.* at 633.

[357] *Id.* Warren testified that at no time did Chisolm ask for an attorney or ask that the interrogation be stopped. *Id.* Warren also testified that no threats of violence or promises of leniency were offered to Chisolm. *Id.*

[358] *Id.*

[359] *Id.* at 635. However, Chisolm testified that he understood his rights and that he did sign a waiver of rights form. *Id.*

[360] *Id. See* Frost v. State, 483 So. 2d 1345, 1350 (Miss. 1986)(murder confession).

[361] 185 So. 2d 671 (Miss. 1966).

[362] *Chisolm*, 529 So. 2d at 634. *See also* Neal v. State, 451 So. 2d 743, 753 (Miss. 1984)(State has burden of proving voluntariness of a confession).

[363] *Chisolm*, 529 So. 2d at 634.

XIV. WITNESSES

Several decisions in the area of criminal law relating to witnesses were rendered by the Mississippi Supreme Court in 1988.[364] Two of these cases will be discussed textually, one discussing the rule of exclusion or sequestration, and the other analyzing the authority of the district attorney to grant immunity from prosecution.[365] In *Douglas v. State*,[366] the court construed Rule 615 of the Mississippi Rules of Evidence,[367] concerning the exclusion or sequestration of witnesses. In *Douglas*, the appellant, Tommie James Douglas was charged with the murder of Lesia Little, found guilty by a jury and sentenced to life imprisonment.[368] The appellant put on an expert witness, James Hall, who testified that Douglas could not have crawled into the broken bedroom window of Little's house without being seriously cut, thereby corroborating Douglas' story that Little was shot by another visitor on the night of the incident, Eric Grady.[369] The Sheriff of Noxubee County, Cecil Russell, who had been present in the courtroom throughout all of the testimony, was called in rebuttal to testify about the window.[370] The appellant raised an objection to the testimony because the sheriff had been in the courtroom.[371] The trial judge overruled the motion, reasoning that the sheriff was allowed to remain in the courtroom at all times, even though the sequestration rule had been invoked by both parties before the trial proceedings began.[372] The sheriff then offered rebuttal testimony about the key factual issue in the trial — whether the broken window was up or down when he investigated the crime scene.[373] On appeal, Douglas alleged that the trial court erred in allowing the sheriff's testimony in violation of the sequestration rule.[374] In analyzing this issue, the Mississippi Supreme Court began by noting that in pre-rules cases it was generally held that it was within the trial court's discretion to allow a witness to testify in rebuttal even though he had been in the courtroom after the sequestration rule had been invoked.[375] The court then stated that under the new Rule 615, judicial discretion is more limited since sequestration is a matter of right except for the three categories of witnesses set forth in the rule.[376] The court then held that it was error for the trial court to allow the sheriff to testify.[377] The court found that the sheriff was not exempted from the rule simply by virtue of his office, unless under category (2) of the rule's exceptions, the sheriff was designated by the district attorney as the State's representative because his presence was necessary to assist the prosecution at trial.[378] The court then outlined the remedies available for violation of the rule as (a) citing the witness for contempt, (b) allowing "full-bore" cross-examination, or (c) striking the testimony only where a party has suffered actual prejudice or when there has been fraud by the witness or counsel.[379] In the instant case, the court found no prejudice since the defense attorney had questioned the sheriff extensively about his testimony.[380] Thus, the court found that the issue of the sheriff's credibility was squarely before the jury, making Douglas' assignment of error without merit.[381]

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[364] Those not textually discussed are as follows: Harrison v. State, 534 So. 2d 175, 179 (Miss. 1988) (under Mississippi Rule of Evidence 607, voucher rule is repudiated and witness may be attacked by any party including party calling him); Smith v. State, 527 So. 2d 660, 664 (Miss. 1988) (although counsel had right to call witnesses in his behalf, it was not his right to force witness to testify to matters which might incriminate that witness); Ryan v. State, 525 So. 2d 799, 801 (Miss. 1988) (under Mississippi Rule of Evidence 601, six year-old child was competent to testify); Ivy v. State, 522 So. 2d 740, 742 (Miss. 1988) (under Mississippi Rule of Evidence 601, five year-old was competent to testify as witness as long as testimony is found by trial judge to be relevant under Rules 401 and 403); George v. State, 521 So. 2d 1287, 1289 (Miss. 1988) (use of contemporaneous notes, made by witness at time of incident, is highly desirable; photographs are analogous to notes and even more reliable); Holmes v. State, 537 So. 2d 882, 885 (Miss. 1988) (not cleared for publication) (failure of either party to examine witness equally accessible to both parties is not proper subject for comment before jury).

[365] These two cases are Douglas v. State, 525 So. 2d 1312 (Miss. 1988), discussing the sequestration rule, and Wright v. McAdory, 536 So. 2d 897 (Miss. 1988), analyzing the district attorney's authority to grant immunity from prosecution.

[366] 525 So. 2d 1312 (Miss. 1988).

[367] Mississippi Rule of Evidence 615 provides:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order on its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an office or employee of a party who is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

MISS. R EVID 615.

[368] *Douglas*, 525 So. 2d at 1313. Lesia Little, the victim, was shot to death in her home in Shuqualak, Mississippi. *Id.* The factual issue at trial was which one of two men, the appellant Tommie Douglas, Little's ex-live-in-partner and father of her children, or Eric Grady, her current boyfriend, actually shot her. *Id.* This factual question depended to a great extent on the fact of whether the appellant broke a bedroom window pane while entering the house, thereby corroborating Grady's story, or whether the window pane was broken by the appellant and Grady while fighting, thereby corroborating the appellant's story that Grady shot Little. *Id.*

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[369] *Id.*

[370] *Id.* at 1315.

[371] *Id.* The appellant claimed this was a violation of the sequestration rule. *Id.*

[372] *Id.*

[373] *Id.* at 1316. The sheriff had not testified during the State's case-in-chief, nor had he offered this particular information to the district attorney until the defense witnesses had testified. *Id.* The sheriff testified that he told the district attorney immediately before his testimony that the window was up when he went back to investigate the house the morning after the incident. *Id.* He claimed that he took his knife and stuck it in the wood frame of the window and pulled it down in order to see if there were any fingerprints or blood on the broken glass. *Id.* at 1315-16.

[374] *Id.* at 1315.

[375] *Id.* at 1316; *see, e.g.*, Hollins v. State, 340 So. 2d 438, 441 (Miss. 1976) (allowing witness to remain in courtroom is within the discretion of trial judge); Butler v. State, 320 So. 2d 786, 788 (Miss. 1975) (sequestration of witnesses is procedural matter and within sound discretion of trial judge). This same principle is applicable to law enforcement personnel specifically. *See* Bell v. State, 443 So. 2d 16, 21 (Miss. 1983) (sequestration discretionary although better practice is to exclude officer, if another officer available for security); Ethridge v. State, 418 So. 2d 798, 800 (Miss. 1982) (witness exclusion discretionary although sheriff's testimony related only to evidence identification and chain of custody); Gaines v. State, 404 So. 2d 557, 562 (Miss. 1981) (sequestration of rebuttal witnesses within trial court's discretion even though sheriff voluntarily removed himself from courtroom during testimony of witnesses).

[376] *Douglas*, 525 So. 2d at 1316. *See supra* note 4 (persons excepted from sequestra-

In *Wright v. McAdory*,[382] the court analyzed the extent to which the district attorney is authorized to grant a witness immunity from prosecution in exchange for the witness' appearance before the grand jury, and whether a person with immunity from prosecution may be subpoenaed and compelled to testify before a grand jury.[383] In *Wright*, the appellant, John Wright, was present at the time of a shooting at Jackson State University.[384] Wright was then subpoenaed to appear before the grand jury which was convened to consider the matter.[385] While before the grand jury, the appellant was told he was not a suspect in the shooting, and, even if he said anything in testimony that might incriminate him, he would enjoy immunity from prosecution.[386]

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tion are: (1) party who is natural person; (2) officer or employee of non-person designated as its representative; and (3) person essential to presentation of cause).

[377] *Douglas*, 525 So. 2d at 1316.

[378] *Id.* at 1317.

[379] *Id. See also* United States v. Blasco, 702 F.2d 1315, 1327 (11th Cir. 1983) (outlining remedies available for violation of rule).

[380] *Douglas*, 525 So. 2d at 1318.

[381] *Id.* The court then addressed the remaining assignments of error raised by Douglas, found them to be without merit, and affirmed the appellant's conviction and sentence. *Id.*

[382] 536 So. 2d 897 (Miss. 1988).

[383] Another case dealing with plea agreements rendered by the Mississippi Supreme Court and not textually discussed was: Doctor v. State, 522 So. 2d 229, 230 (Miss. 1988) (if guilty plea was involuntary, as induced by a promise of earned time, court had no choice but to set aside guilty plea for retrial).

[384] *Wright*, 536 So. 2d at 899. The prime suspect in this shooting was Chauncey Wright, the brother of the appellant. *Id.*

[385] *Id.*

[386] *Id.*

Notwithstanding this immunity offer, Wright refused to testify, invoking his fifth amendment privilege against self-incrimination.[387] The Circuit Court of Hinds County held Wright in contempt and committed him to the custody of the Sheriff of Hinds County.[388] Wright then filed a Petition for Writ of Habeas Corpus with the Mississippi Supreme Court, challenging the legality of the contempt order.[389] In addressing this issue, the court began by noting that in the past it had expressed considerable doubt that the district attorney had the authority to grant a witness immunity from prosecution in exchange for testimony.[390] The court then set forth a fundamental premise that the district attorney has the authority to make an agreement with an individual the terms of which are, in substance, that the State agrees that the individual will not be prosecuted and that the individual will testify in subsequent judicial proceedings.[391] The court then stated that where that immunity agreement is submitted to and approved by the court, there can be no doubt of its validity and enforceability.[392] In addition, the court stated that present federal law holds that federal authorities are obligated to honor grants of immunity by the states.[393]

In addressing the second issue, the court found that since an individual may not involuntarily be stripped of his privilege against self-incrimination, he may not be compelled to testify before the grand jury unless the grant of immunity offered is coextensive with the protection he enjoys under the United States Constitution.[394] Any grant of immunity which affords the individual less protection than otherwise available to him by federal law is by definition inadequate.[395] In the instant case, the court found that before the prosecution can place an individual such as John Wright in a position where he had no right to refuse to testify and to subject him to contempt if he refused, it is required to grant him immunity from prosecution for his involvement with the matter of which he is testifying before the grand jury and for any transaction, matter, or thing concerning that which he may testify or produce evidence.[396] This extensive immunity requirement construes article 3, section 26 of the Mississippi Constitution to require a "transactional" immunity grant, i.e., any transaction about which the witness might testify.[397] Since the immunity agreement offered to Wright was inadequate in several aspects, the court granted the appellant's writ of habeas corpus and ordered him released from custody.[398]

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[387] *Id.* The individual enjoys a right against self-incrimination by virtue of the fifth amendment to the Constitution of the United States, made enforceable against the States by the fourteenth amendment (Malloy v. Hogan, 378 U.S. 1, 6-11 (1964)) and art. III, sect. 26 of the Mississippi Constitution. *Wright*, 536 So. 2d at 899 n.1.

[388] *Wright*, 536 So. 2d at 899.

[389] *Id.* at 900. The supreme court ordered that Wright be released on bond pending consideration of his petition. *Id.*

[390] *Id.* at 901. *See, e.g.*, Smith v. State, 492 So. 2d 260, 268 (Miss. 1986) (no authority in state that requires or gives court authority to grant immunity in exchange for testimony); Hubbard v. McKey, 193 So. 2d 129, 131 (Miss. 1966) (no statute, constitutional provision, or law authorizing court to grant immunity in such cases).

[391] *Wright*, 536 So. 2d at 902.

[392] *Id. See also* MISS. CODE ANN. § 99-15-53 (1972) (district attorney shall not compromise cause without consent of court).

[393] *Wright*, 536 So. 2d at 903. *See* Kastigar v. United States, 406 U.S. 441, 456-57 (1972) (privilege protects State witnesses against incrimination under federal as well as state law); Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964) (State witness cannot be compelled to give testimony which may be incriminating under federal law.)

[394] *Wright*, 536 So. 2d at 903.

XV. PLEA BARGAIN AGREEMENTS

In 1988, the Mississippi Supreme Court also addressed the issue of the enforceability of plea bargain agreements. In *Danley v. State*,[399] the appellant, Bernard Douglas Danley, was found guilty of murder and sentenced to life imprisonment.[400] After Danley was arrested, the district attorney and the appellant had entered into a memorandum of immunity (immunity agreement).[401] Under the provisions of this agreement, Danley was to direct law enforcement officials to the body of the victim, William Platt, and assist them in locating the person(s) who murdered him.[402] In exchange for the appellant's full and truthful cooperation, the State and the district attorney were to recommend to the trial court that Danley be tried as an accessory after the fact of murder and as a conspirator to distribute a controlled substance.[403] Upon entry of the appellant's guilty plea, the State promised to recommend a sentence of five years on the accessory charge and five to ten years on the controlled substance charge and that Danley serve his sentence in a Department of Corrections work center or county jail near Lucedale.[404] After the agreement had been entered into, the district attorney felt that Danley had lied about certain details of the evening of the incident.[405] As a consequence, the district attorney decided that the agreement should be terminated, and the decision was then made to prosecute Danley for Platt's murder.[406] Danley challenged this decision by the district attorney as a violation of the terms of the agreement.[407] The issue before the Mississippi Supreme Court was whether the district attorney had the unilateral authority to make the decision to terminate the immunity agreement.[408] The court first began its analysis of this issue by stating that the memorandum of understanding, although unorthodox, was a plea bargain.[409] The court next found that the prosecution had failed to honor the defendant's rights scrupulously.[410] First, the court found no indication that the district

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[395] *Id.*

[396] *Id.* Moreover, this testimony or evidence may not be used against the witness in any criminal prosecution, except perjury. *Id.*

[397] *Id.* at 903-04. This transactional immunity construction stands as an independent State ground for decision by Michigan v. Long, 436 U.S. 1032, 1037-44 (1983). *Wright*, 536 So. 2d at 904 n.4.

[398] *Wright*, 536 So. 2d at 905. The immunity agreement was inadequate because it limited Wright's immunity to his involvement in the shooting incident, thereby falling short of the definition of transactional immunity; the immunity grant did not fully advise the witness that he is at all times subject to prosecution for perjury under MISS. CODE ANN. § 97-9-59 (1972); the immunity agreement stated that it was not binding on other local, state, and federal authorities; and the grant did not extend Wright complete transactional immunity with the sole and limited exception that he may be prosecuted for perjury. *Wright*, 536 So. 2d at 904.

[399] No. 58,161 (Miss. Dec. 28, 1988) (not released for publication).

[400] *Danley*, slip op. at 1. Danley was convicted for the murder of William Platt (also known as "Fuzzy" or "Buddy"), who was stabbed to death. *Id.* slip op. at 2. The appellant and Platt were co-workers at the International Paper Company in Moss Point, Mississippi. *Id.* The two first became acquainted when Platt, according to Danley, approached him about the idea of selling marijuana. *Id.* On the evening of the incident, a meeting had been arranged between Danley and Platt, the purpose of which was for Danley to pay Platt for a pound of marijuana. *Id.* Danley claimed that Platt was stabbed by Marlo Reid, who was also present at the meeting between Danley and Platt. *Id.* Reid maintained that Danley and Platt were engaged in a drug transaction when Platt yelled. *Id.* at 2-3. Reid became fearful and ran off into the woods. *Id.* Reid subsequently hitch-

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hiked back to Alabama. *Id.*

[401] *Id.* at 4.

[402] *Id.*

[403] *Id.*

[404] *Id.* at 5.

[405] *Id.* The reason given by the district attorney was that Danley had lied about certain key information, specifically whether he had taken anything from Platt's vehicle. *Id.*

[406] *Id.*

[407] *Id.* Danley claimed that the district attorney never intended to keep the promises made in the immunity agreement was made was to unable law enforcement officials to discover Platt's body. *Id.* at 5-6.

[408] *Id.* at 6-7.

[409] *Id.* The United States Supreme Court held that the process of plea bargaining is to be encouraged if properly and fairly administered. Santobello v. New York, 404 U.S. 257, 260 (1971).

[410] *Danley*, slip op. at 7. The prosecution is held to "the most meticulous standards of both promise and performance." Correale v. United States, 479 F.2d 944, 947 (1st Cir. 1973).

attorney had ever sought approval of the trial court before reaching the plea agreement with Danley and, more seriously, never asked approval of the court before unilaterally rescinding the agreement.[411] The court ruled that the question of whether the defendant had failed to perform the condition precedent to the enforceability of the plea agreement must be determined by the court and only on the basis of adequate evidence.[412] The court then emphasized the importance of upholding plea bargain agreements when the defendant has relied on them to his detriment.[413] In the instant case, the court found elements of detrimental reliance and remanded the case so that the State would be required to honor the terms of the plea bargain agreement.[414]

XVI. MISCELLANEOUS

Several cases dealing with miscellaneous issues were presented to the Mississippi Supreme Court.[415] The supreme court also decided several issues related to the rights of the accused in 1988.[416] Two such decisions warranting textual discussion deal with the right to a public trial and the right to counsel for voice line-ups.[417] In *Lee v. State*,[418] James E. Lee was found guilty of rape and sentenced to forty years imprisonment.[419] At his trial, the State moved that the public be excluded from the courtroom during the victim's testimony.[420] The appellant objected to the exclusion on the basis of his sixth amendment right to a public trial.[421] An informal hearing was held in the judge's chambers, whereupon the court sustained the State's motion to exclude the public.[422] On appeal, Lee continued to maintain that the lower court's action violated his right to a public trial.[423] In analyzing this issue, the Mississippi Supreme Court first recognized a conflict between article 3, section 26 of the Mississippi Constitution, which authorizes the exclusion of the public when the prosecution is for rape, and the sixth amendment to the United States Constitution, which contains no exclusion of the public for any purpose.[424] The court then

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[411] *Danley*, slip op. at 7-8.

[412] *Id.* at 8. The court cited numerous decisions which approved this holding. *Id. See, e.g.*, United States v. Donahey, 529 F.2d 831, 832 (5th Cir. 1976) (court had ample basis for concluding that appellant had failed to live up to her part of plea bargain agreement); Kresler v. State, 462 So. 2d 785, 788 (Ala. Cr. App. 1984) (question before court is whether defendant performed his obligation in plea bargain); Brown v. State, 607 S.W. 2d 801, 804 (Mo. App. 1980) (court's decision as to whether defendant fulfilled his part of plea bargain agreement).

[413] *Danley*, slip op. at 9. *See, e.g.*, Edwards v. State, 465 So. 2d 1085, 1086 (Miss. 1985) (in light of appellant's detrimental reliance on agreement, State should be made to comply with obligations under agreement).

[414] *Danley*, slip op. at 9-10.

[415] Those cases not discussed textually are Brown v. State, 533 So. 2d 1118, 1122 (Miss. 1988) (although MISS. CODE ANN. § 99-15-26 (2)(d) does not use specific word "probation" it nevertheless authorizes court to place defendant on probation); Yarbrough v. State, 528 So. 2d 1130, 1130 (Miss. 1988) (issue of insanity for jury to determine); State v. Europa Cruise Line, Ltd., 528 So. 2d 839, 840 (Miss. 1988) (motion to dissolve preliminary injunction not final order, thus, interlocutory appeal not proper); Boyd v. State, 523 So. 2d 1037, 1040 (Miss. 1988) (if photographs are relevant, mere fact they are unpleasant or gruesome is not bar to admission into evidence); McKinney v. State, 521 So. 2d 898, 899 (Miss. 1988) (conviction of rape may be upheld with uncorroborated testimony of victim); Roberts v. State, 519 So. 2d 896, 896 (Miss. 1988) (assignments of error without merit and appeal raises no issue requiring discussion).

[416] Those cases not discussed textually include Estes v. State, 533 So. 2d 437, 441 (Miss. 1988) (person cannot complain of illegal search of third party's premises since his fourth amendment rights are not infringed); Bostic v. State, 531 So. 2d 1210, 1213-14 (Miss. 1988) (where defendant was aware that his disruptive behavior was reason for his first removal and that continued disruption would result in second removal, such occurrences amounted to warning that he would be removed from courtroom); Hood v. State,

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523 So. 2d 302, 309-10 (Miss. 1988) (introduction of judge's opinion and testimony of attorneys in prior case amounts to improper influence on grand jury); West v. State, 519 So. 2d 418, 423 (Miss. 1988) (error for judge to improperly interject himself into proceedings before court since jurors are very susceptible to judge's influence); Pinson v. State, 518 So. 2d 1220, 1222 (Miss. 1988) (granting of continuance within sound discretion of trial judge); Avery v. State, No. 58,022 (Miss. Nov. 2, 1988) (not released for publication) (right to confrontation is not constitutionally required prior to trial on indictment).

[417] These two cases are Lee v. State, 529 So. 2d 181 (Miss. 1988), dealing with the right to a public trial, and Nicholson v. State, 523 So. 2d 68 (Miss. 1988), addressing the issue of the right to counsel for voice lineups.

[418] 529 So. 2d 181 (Miss. 1988).

[419] *Lee*, 529 So. 2d at 181. The victim, Ann, met Lee through friends and began dating him for several weeks. *Id.* In one such date, Lee and Ann went for a ride in his automobile. *Id.* Eventually, the couple made their way to a piece of property on which Lee intended to put his house trailer. *Id.* Ann testified that while on the property Lee forcibly raped her. *Id.* He then returned to her home. *Id.* at 181-82.

[420] *Id.* at 182. The basis for this exclusion request was that the victim was extremely sensitive. *Id.* The district attorney also cited art. III, section 26 of the Mississippi Constitution of 1890 which provides for the exclusion of the public from prosecutions for rape, adultery, fornication, sodomy, or crimes against nature, in the court's discretion. *Id.*

[421] *Id.*

[422] *Id.* The reasons articulated by the judge for the exclusion were: "Ann was a virgin at the time of the rape; Ann was an extremely religious and sheltered young girl who was extremely sensitive; Ann's feelings of humiliation and her anticipation of public scrutiny had influenced her to drop the case at one point; Ann had great difficulty in expressing herself and Ann refused to say the words 'penis' and 'vagina' in front of the public present in the courtroom." *Id.*

[423] *Id.*

[424] *Id.* The sixth amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime

noted that numerous federal courts have recognized that the sixth amendment right to a public trial in a criminal case may be limited by exclusion of spectators to the extent necessary to avoid the embarrassment or emotional disturbance of a witness giving testimony in a particular case.[425] Since the trial judge had held an evidentiary hearing, made findings sufficient for exclusion, and never excluded court officials, the appellant, legal counsel, or the jury, the court in the instant case held that there was no violation of the sixth amendment.[426]

In *Nicholson v. State*,[427] the court addressed the issue of whether a voice line-up is equivalent to a corporal line-up and thus requires the protection of the right to counsel. In *Nicholson*, the appellant, James Harvey Nicholson, was convicted of rape and sentenced to thirty years imprisonment.[428] Subsequent to her attack, the victim, Sandra McKinion, was in the police station for further questioning.[429] As she walked into the station, the victim overheard Nicholson's voice and immediately identified the voice as that of her assailant.[430] Nicholson claimed that his sixth amendment right to counsel was violated by this "show-up."[431] In addressing this question, the court held that Nicholson's right to counsel was not violated in the absence of any evidence of staging, even assuming that a "voice overhearing" was equivalent to a

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> shall have been committed, which district shall have been previously ascertained by law, and to be enforced of the nature and cause of the accusation; to be confronted with the witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

[425] *Id. See, e.g.*, United States ex rel. Latimore v. Sielaff, 561 F.2d 691, 695 (7th Cir. 1971)(court closed to public hearing testimony of twenty-one year-old rape victim), *cert. denied* 434 U.S. 1076 (1978); Douglas v. State, 328 So. 2d 18, 20-21 (Fla.) (court closed to general public during rape victim's testimony), *cert. denied* 429 U.S. 871 (1976).

[426] *Lee*, 529 So. 2d at 183.

[427] 523 So. 2d 68 (Miss. 1988).

[428] *Nicholson*, 523 So. 2d at 70. Sandra McKinion was awakened during the early morning hours of August 30, 1985, to find someone standing over her with a knife to her head. *Id.* The man forced her to take her clothes off and then raped her. *Id.* McKinion was able to discern, on the body of her attacker, a tattoo on his right arm, a scar on his rib cage, and that he was a black man with short hair, a light beard, and a little mustache. *Id.*

[429] *Id.* at 73.

[430] *Id.* One police officer testified that he knew Nicholson was in the station that night, but that such knowledge did not prompt him to bring McKinion into the station nor did he know that Nicholson would still be in the station when he returned with McKinion. *Id.* He also testified that he did not tell McKinion that Nicholson was in the station. *Id.*

[431] *Id.*

"show-up."[432] Nicholson also argued that a voice "line-up" held at the police station was a violation of his right to counsel.[433] The court analogized a corporeal line-up to a voice line-up and found that this kind of voice line-up closely resembled the trial-like confrontation of a corporal line-up, thus amounting to a critical stage for which counsel should be present.[434] In addressing the issue of whether Nicholson's right to counsel had attached, the court stated that if the voice line-up was conducted before Nicholson was arrested pursuant to a warrant then his right to counsel claim was without merit; but if Nicholson was arrested at the time of the line-up, his right to counsel had attached.[435] If the voice line-up was conducted in violation of his right to counsel, then testimony about the voice identification would then be inadmissible.[436] In the instant case, the court found the record unclear as to whether Nicholson was under arrest at the time of the voice line-up but held that, even if the line-up was conducted in violation of the appellant's right to counsel, the use of the voice line-up identification testimony at trial was harmless constitutional error since the voice line-up was not the first confrontation between the victim and the appellant.[437] The court also noted that even if the voice line-up had been conducted in violation of Nicholson's right to counsel, the in-court identification would have still been permitted upon a showing by clear and convincing evidence that the identification was based in observations of the suspect other than that of the line-up identification.[438] Thus, in the instant case, the court held there was clear and convincing evidence that the victim made her in-court identification of Nicholson based on her intimate observations of the accused on the night of the crime, not on the voice line-up, and affirmed Nicholson's conviction and sentence.[439]

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[432] *Id.* The Mississippi Supreme Court held in Thompson v. State, 483 So. 2d 690 (Miss. 1986) that there is no violation of the right to counsel where the encounter was inadvertent and not staged. *Thompson*, 483 So. 2d at 692.

[433] *Nicholson*, 523 So. 2d at 73.

[434] *Id.* at 73-74.

[435] *Id.* at 74.

[436] *Id.*

[437] *Id.* The court stated that, under Moore v. Illinois, 434 U.S. 220 (1977) and Gilbert v. California, 388 U.S. 263 (1966), it would have to determine beyond a reasonable doubt that the admission of the testimony in the instant case constituted harmless constitutional error under Chapman v. California, 386 U.S. 18 (1967). *Nicholson*, 523 So. 2d at 74. Thus, the court stated that, had the voice lineup been the first confrontation and in violation of Nicholson's right to counsel, testimony of any subsequent pre-trial identification would also have been inadmissible because of the possibility of exploitation of the initial illegality. *Nicholson*, 523 So. 2d at 74.

[438] *Id.* at 75.

In the concurring opinion, Justice Robertson found that Nicholson's right to counsel had attached prior to the time of the voice line-up in which he was identified by the victim.[440] Although Justice Robertson found the line-up to be in violation of Nicholson's right to counsel, he found that a reversal of the conviction was not required since the victim had subsequently identified the appellant in the courtroom.[441]

Three other cases, one dealing with the guidelines for imposing a death sentence, another with juror note-taking, and the last with an indictment alleging offenses against a municipality, will be discussed textually.[442] In *White v. State*,[443] the court discussed section 99-19-101 (7) of the Mississippi Code which sets forth the guidelines for imposing the death sentence. In *White*, the appellant, Willie Lee White, was convicted of the capital murder of Annie Dale Lewis and sentenced to death.[444] White alleged that the evidence presented was legally insufficient to support the sentence of death imposed upon him.[445] In addressing this issue, the Mississippi Supreme Court looked to the guidelines set forth in section 99-19-101(7) of the Mississippi Code which requires a finding by the jury of one or more of the following elements: that the defendant actually killed, intended to kill, or contemplated that lethal force would be employed.[446] The court held that juries, when imposing sentences, must be instructed that the findings under subsection (7) must be beyond a reasonable doubt.[447] In the instant case, the court noted that the proper instruction was given but then reviewed the evidence to determine whether it was legally sufficient for the imposition of the death sentence.[448] Using this analysis, the court held that the evidence was legally insufficient to establish beyond a reasonable doubt that White killed or attempted to kill.[449] As to the other two statutory elements, the court found that, although the evidence was sufficient for a capital murder conviction, the evidence offered no indication that the appellant was the killer or that there was any contemplation of the use of lethal force.[450] Thus, the court affirmed White's murder conviction and reversed and rendered the penalty sentence.[451]

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[439] *Id.*

[440] *Id.* at 76. Justice Robertson stated that Nicholson had been in police custody at least forty consecutive hours prior to the voice line-up. *Id.* Thus, since his freedom of movement was effectively restricted he was in custody and should have promptly been offered counsel. *Id.*

[441] *Id.* at 77.

[442] These cases are White v. State, 532 So. 2d 1207 (Miss. 1988), dealing with the guidelines for imposing a death sentence under MISS. CODE ANN. 99-9-101 (7); Wash v. State, 521 So.2d 890 (Miss. 1988), dealing with the taking of notes by the jurors; and Sartain v. City of Water Valley, 528 So. 2d 1125 (Miss. 1988), discussing an indictment alleging offenses against the municipality.

[443] 532 So. 2d 1207 (Miss. 1988).

[444] *White*, 532 So. 2d at 1209. Lewis, the owner of Poo-Nannie's in Grenada, Mississippi, had been shot during a robbery and died three days later from the bullet wound. *Id.* White was identified as one of the two persons seen fleeing the crime scene. *Id.*

[445] *Id.* at 1219.

[446] *Id.* The court stated that these findings may be based only on credible evidence. *Id.* Section 99-19-101 (7) was enacted in 1983 in response to Enmund v. Florida, 458 U.S. 782 (1982). *Id.* The court stated that, with this statutory enactment, the legislature had established two unyielding requirements: (1) that the state shoulder a definite and stringent burden to show (2) specific and credible evidence establishing at least one of the prongs described in *Enmund* and now embodied in Section 99-19-101 (7). *White*, 532 So.

In a dissent to the majority's sentencing opinion, Justice Griffin, citing *Emmund v. Florida*[452] and its progeny, stated that federal courts have upheld the death penalty where an accomplice had committed the murder, while the majority in the instant case refused to impose such a penalty on the appellant although it was clearly established that he had robbed his victim with a gun.[453] Justice Griffin also strongly disagreed with the majority's contention that the element of proof set forth in *Emmund* varied from that established by precedent for section 99-19-101 (7) of the Mississippi Code.[454]

In *Wash v. State*,[455] the Mississippi Supreme Court addressed the issue of whether jurors should be allowed to take notes of the testimony during a trial. In *Wash*, the appellant, Joe Milton Wash, was convicted by a jury of armed robbery and sentenced to thirty years imprisonment.[456] Subsequent to the return of the verdict, it was dis-

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2d at 1219.

[447] *Id.* The court stated that although subsection (7) does not identify the minimum amount of proof necessary to establish one or more of the findings, there are numerous analogous situations which do require proof beyond a reasonable doubt. *Id.*

[448] *Id.* at 1220.

[449] *Id.*

[450] *Id.* at 1221.

[451] *Id.* at 1222.

[452] 458 U.S. 782 (1982).

[453] *White*, 532 So. 2d at 1227-29.

[454] *Id.* at 1231. Justice Griffin set forth a line of cases reflecting the fact that the Mississippi Supreme Court had specifically adopted the constitutional standard enunciated in *Emmund. Id.*

[455] 521 So. 2d 890 (Miss. 1988).

[456] *Wash*, 521 So. 2d at 891. The mobile home of Wilson Blaylock was robbed by two men, one of whom was identified by Blaylock as the appellant, Wash. *Id.* at 892.

covered that one of the jurors had taken notes during the trial.[457] Wash moved for a new trial and the trial judge held a hearing on the matter.[458] Since the juror in question testified that no one else saw the notes and that she did not refer to them again or read from them during the jury's deliberations, the trial judge found the appellant had suffered no prejudice and overruled his motion for a new trial.[459] On appeal, Wash argued that the use of the notes may have skewed the jury's interpretation of the facts to the perspective of the juror who took notes.[460] Although the issue before the court was not whether jurors should be permitted to take notes but whether a new trial was warranted by the facts of the instant case,[461] the supreme court held that juror note-taking should be left to the sound discretion of the trial judge to permit in cases where he deems it desirable or necessary in complicated matters or where both parties agree that jurors may take notes.[462] The court also recommended that when jurors are allowed to take notes the trial judge should give directions and set limitations on the use of these notes.[463] The court held that since the trial judge had been required to hold a *post hoc* ruling on the issue he had not abused his discretion in not granting a new trial.[464]

In *Sartain v. City of Water Valley*,[465] the Mississippi Supreme Court addressed the question of whether an affidavit charging an offense in the name of the municipality should have been brought in the name of the State of Mississippi. In *Sartain*, the appellant, Josephine Sartain, was convicted of disturbing the peace and sentenced to five months imprisonment and a fine of $483.00.[466] The affidavit charging the appellant was brought in the name of the City of Water Valley. Sartain alleged that it was insufficient in law because it did not reflect a prosecution in the name of the State of Mississippi or charge an offense against the peace and dignity of the State.[467] In addressing this issue, the supreme court noted that state law empowers municipal courts to hear and determine all violations of municipal ordinances and state misdemeanors made offenses against municipalities; thus authorizing the City of Water Valley to declare as offenses against the municipality, conduct declared unlawful as misdemeanors under the laws of the state.[468] Sartain based her contention on article VI, section 169 of the Mississippi Constitution which mandates that "all prosecutions shall be carried on in the name and by authority of the 'State of Mississippi,' and all indictments shall conclude 'against the peace and dignity of the state.' "[469] The court held that section 169, as a matter of common sense, did not and should not apply literally to prosecutions for violations of municipal ordinances in municipal courts.[470] In the instant case, the court stated that the prosecution neither in fact nor in law had been brought by the State of Mississippi, but by the City of Water Valley and to say otherwise would be highly misleading.[471] Since the affidavit reflected a public prosecution within the authority of the City of Water Valley, the court found it to be in conformity with present case law and affirmed Sartain's conviction.[472]

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[457] *Id.* at 897. The juror taking notes was not observed by either the prosecutor or the defense counsel until the verdict was returned. *Id.* The court clerk discovered the notes when the jury returned to deliver the verdict. *Id.*

[458] *Id.* The juror testified that she worked with the Social Security Administration and was trained to take notes as to pertinent and discrepant evidence. She did take the notes into the jury room and condensed them onto a second sheet of paper in the jury room but allowed no one else to see them. *Id.*

[459] *Id.*

[460] *Id.*

[461] *Id.* The trial judge had made a *post hoc* ruling on the issue of juror note-taking since the notes were not discovered until after the verdict was delivered. *Id.*

[462] *Id.*

[463] *Id.*

[464] *Id.*

[465] 528 So. 2d 1125 (Miss. 1988).

[466] *Sartain*, 528 So. 2d at 1125.

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[467] *Id.*

[468] *See* Miss. Code Ann. § 21-23-7(1) (Supp. 1987)(jurisdiction of municipal courts); Miss. Code Ann. § 21-13-19 (1972) (municipality has authority to declare unlawful conduct which is misdemeanor under state law).

[469] Miss. Const. art. VI, § 169 (1890).

[470] *Sartain*, 528 So. 2d at 1126.

[471] *Id.*

[472] *Id.* at 1127. Although the court found Sartain's prosecution to be lawful, it vacated her fine since it clearly exceeded that authorized by the city ordinance. *Id.*

Other miscellaneous cases were decided in the areas of indictments,[473] objections,[474] bonds,[475] and parole eligibility.[476]

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Tracy Oakley
Monty Simpkins

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[473] Cases relating to indictments include the following: Brown v. State, 534 So. 2d 1019, 1022-23 (Miss. 1988) (there is no error in multi-count indictment when crimes have same elements of proof and arise from same transactions and occurrences); Woodward v. State, 533 So. 2d 418, 422 (Miss. 1988) (no objection may be validly raised to multi-count indictment if dictates of MISS. CODE ANN. § 99-7-2 (Supp. 1987) are followed); Doby v. State, 532 So. 2d 584, 586-87 (Miss. 1988) (test of prejudice in amendment of indictment is whether defense available under original indictment is equally available under amended indictment); Gardner v. State, 531 So. 2d 805, 808 (Miss. 1988) (where indictment includes statutory sections under which appellant was indicted and clear and concise statement of crime charged, crime is properly charged); Alexander v. State, 520 So. 2d 127, 129 (Miss. 1988) (where indictment charges lewd suggestion combined with physical act, overt act was suitable for ultimate commission of crime).

[474] *See* Moawad v. State, 531 So. 2d 632, 635 (Miss. 1988) (failure to make contemporaneous objection at trial constitutes waiver of any error subsequently assigned); Smith v. State, 530 So. 2d 155, 160 (Miss. 1988) (appellant waived error by failure to object at earliest opportunity, together with use of evidence in his own case-in-chief and during closing argument); Crenshaw v. State, 520 So. 2d 131, 134 (Miss. 1988) (where trial court sustains objection and directs jury to disregard statement, it is presumed that jurors follow instruction of court so as dissipate any prejudicial effect); Singleton v. State, 518 So. 2d 653, 655 (Miss. 1988) (contemporaneous objection necessary to preserve right to raise error on appeal).

[475] *See* Dixon v. State, 528 So. 2d 832, 832-33 (Miss. 1988) (where bond, though imperfect, was filed and approved by justice court judge, circuit court should have granted appellant's request for hearing and opportunity to correct any deficiencies); Lambert v. State, 524 So. 2d 576, 578 (Miss. 1988) (when appellant agreed to, and executed with sureties, recognizance bond, he effectively waived right to preliminary hearing); Sides v. State, 519 So. 2d 1222, 1223-24 (Miss. 1988) (MISS. CODE ANN. § 83-39-7 (1972) provides that bondsman may petition court for refund of money forfeited on final judgment or may petition for stay and remission of forfeiture where there is proof of defendant's incarceration within another jurisdiction).

[476] *See* McFadden v. State, 523 So. 2d 77, 78 (Miss. 1988) (where appellant became eligible for earned time after attorney general's opinion that such time cannot be used to reduce sentence to less than ten years, he has no claim of entitlement to reduction of his parole eligibility date); Voyles v. State, 520 So. 2d 501, 502-03 (Miss. 1988) (full earned time credit must be given appellant, if deserved, for time be was incarcerated illegally as ineligible Class IV offender).

MISCELLANEOUS

I. Family Law

In 1988, the Mississippi Supreme Court rendered decisions in the area of family law regarding the issues of alimony,[1] child custody,[2] child support,[3] paternity,[4] separate maintenance,[5] defenses to an action for divorce including recrimination[6] and condonation or connivance,[7] as well as miscellaneous other issues.[8]

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[1] *See* Jones v. Jones, 532 So. 2d 574, 579-80 (Miss. 1988) (textually discussed); Geiger v. Geiger, 530 So. 2d 185, 187 (Miss. 1988) (where husband's motion to modify alimony is denied because of failure to show sufficient material change in circumstances to justify reduction, but where husband's motion nevertheless has some merit, then ex-wife is not entitled to attorney's fees); Hollman v. Hollman, 527 So. 2d 90,92 (Miss. 1988) (alimony award of $2,500 per month for ten years constitutes periodic alimony and, as such, terminates upon death of husband or remarriage of wife); Carpenter v. Carpenter, 519 So. 2d 891, 895 (Miss. 1988) (wife not entitled to alimony where her net worth exceeded that of husband).

[2] *See* Walters v. Walters, 519 So. 2d 427, 428 (Miss. 1988) (Uniform Child custody Jurisdiction Act determines subject matter jurisdiction in interstate custody battle).

[3] *See* Clark v. Myrick, 523 So. 2d 79, 82 (Miss. 1988) (there may be no modification of child support decree absent substantial change in circumstances of one of interested parties).

[4] *See* Deer v. Mississippi State Dept. of Pub. Welfare, 518 So. 2d 649, 653 (Miss. 1988) (where defendant in paternity suit makes timely request that parties submit to blood tests, then, where substantial doubt exists that defendant is father of child whose paternity is to be established, Miss. Code Ann. § 93-9-21 (Supp. 1987) requires that defendant's request be granted).

[5] *See* Williams v. Williams, 528 So. 2d 296, 298 (Miss. 1988) (monthly separate maintenance representing 96% of husband's monthly income held clearly excessive; $10,000 "lump sum" separate maintenance contrary to principle of separate maintenance); Thompson v. Thompson, 527 So. 2d 617, 623 (Miss. 1988) (chancery court may not order a division of marital assets after denying both parties divorce but granting wife separate maintenance).

[6] *See* Parker v. Parker, 519 So. 2d 1232, 1236 (Miss. 1988) (textually discussed).

[7] *See* Cheatham v. Cheatham, 537 So. 2d 435, 442 (Miss. 1988) (continued cohabitation with unfaithful marital partner while waiting for second indiscretion does not alone constitute condonation or connivance).

[8] *See* Traub v. Johnson, 536 So. 2d 25, 27 (Miss. 1988) (where prior agreement regarding property distribution between parties to divorce is not submitted to chancellor as part of property settlement, that agreement is unenforceable); *In re* Last Will & Test. of Cobert C. Blackwell, 531 So. 2d 1193, 1196 (Miss. 1988) (textually discussed); Mayoza v. Mayoza, 526 So. 2d 547, 550 (Miss. 1988) (where default judgment in divorce proceeding is entered against defendant for failure to appear, trial court's subsequent refusal to vacate judgment will not be overturned absent abuse of discretion); Estate of Hensley v.

A. Property Division

In *Jones v. Jones*[9] the trial court determined that Fred Jones had been guilty of habitual cruel and inhuman treatment, and, accordingly, awarded his wife Becky a divorce.[10] The lower court held that Becky contributed to Fred's acquisition of substantial real estate holdings.[11] The court then adjudicated that Fred and Becky were equal owners of the accumulated property.[12] In its final judgment, the lower court ordered an equal division of properties jointly accumulated by Fred and Becky despite the fact that the property was held in Fred's name alone.[13]

On appeal to the Mississippi Supreme Court, Fred contended that it was error for the chancery court to divest him of real property of which title was in his name exclusively.[14] The Mississippi Supreme Court held that the rule Fred sought to invoke no longer applies in Mississippi where one spouse has contributed his or her money or labor

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Estate of Hensley, 524 So. 2d 325, 327 (Miss. 1988) (as with any contract, antenuptial agreements must be construed in their entirety without giving undue weight to any individual portion); In re Conservatorship of Stallings, 523 So. 2d 49, 52 (Miss. 1988) (it is not necessary for ward to be non compos mentis in order for conservator to be appointed); In Interest of R.T., 520 So. 2d 136, 138 (Miss. 1988) (MISS. CODE ANN. § 43-21-455 (1972) requires that petitions alleging delinquency contain citation of statute or ordinance which child is alleged to have violated; however, failure to include citation will be fatal only if child is misled to his prejudice); In Interest of M.I., 519 So. 2d 433, 436 (Miss. 1988) (placement of minors in detention center subjects minor to jurisdiction of youth court which has authority to grant injunctive relief, cite persons for contempt); Prante v. Beggiani, 519 So. 2d 1208, 1213 (Miss. 1988) (Hinds County Chancery Court had jurisdiction to grant adoption of child despite continuing jurisdiction of Carroll County Youth Court over neglect of child case); Cooper v. Cooper, 518 So. 2d 664, 666 (Miss. 1988) (conversation of wife with IRS agent to effect that husband intended to have wife murdered insufficient to support chancellor's award of divorce on ground of habitual cruel and inhuman treatment); Methodist Hospital of Memphis v. Guardianship of Stephen G. March, 518 So. 2d 1227, 1228 (Miss. 1988) (mother had no legal authority, absent prior chancery court approval, to execute any document binding minor's estate insofar as insurance to which minor was entitled); Karenina By Vronsky v. Presley, 526 So. 2d 518, 525 (Miss. 1988) (unsuccessful adoption petitioner may be assessed attorney's fees).

[9] 532 So. 2d 574 (Miss. 1988).

[10] *Jones*, 532 So. 2d at 577. The Mississippi Supreme Court upheld the trial court's adjudication that Fred had been guilty of habitual cruel and inhuman treatment as well as the lower court's award of divorce to Becky. *Id.* at 578.

[11] *Id.* at 577.

[12] *Id.* at 578.

[13] *Id.*

[14] *Id.* at 578-79. Fred relied on the longstanding rule that the chancery court cannot divest a spouse of title to real property. *Id.* at 581.

toward the economic success of the marriage.[15] The court held that where a spouse has contributed cash or in kind services in working with his or her husband or wife, Mississippi law vests in the chancery court the authority to order an equitable division of the martial property, including title to real property.[16]

In a concurring opinion, Justice Prather maintained that the court should adopt a rule which would permit the chancery court to distribute property incident to divorce without regard to which spouse actually holds title to the property. Justice Prather advocated a rule which would permit the chancery court to consider a spouse's contributions, such as homemaking, to the marital relationship.[17]

B. Recrimination

In *Parker v. Parker*,[18] Mrs. Parker sued her husband for divorce on the ground of habitual cruel and inhuman treatment.[19] The chancery court found that Mr. Parker had been guilty of the martial offense as alleged;[20] however, the court denied the divorce, holding that the plaintiff had been guilty of adultery and that the defense of recrimination prohibited the granting of a divorce.[21] The Mississippi Supreme Court upheld the determination that Mr. Parker had been guilty of habitual cruel and inhuman treatment.[22] The court, however, reversed the lower court's holding that recrimination is a defense to an action for divorce in this case.[23] Citing section 93-5-3 of the Mississippi Code,[24] the court held that the Mississippi legislature "has, in the least, greatly weakened the defense of recrimination."[25] The court also stated that the historical reasons justifying recrimination "are impractical and fail with the mores of the present times . . . ."[26] Thus, the court held that since the alleged recrimination occurred after the marriage had been destroyed, it was error for the chancellor to invoke the doctrine of recrimination and deny the plaintiff a divorce on the ground of habitual cruel and inhuman treatment.[27]

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[15] *Id.* at 579. The court noted a series of cases which have eroded the rule relied on by appellant. In Clark v. Clark, 793 So. 2d 447 (Miss. 1974), the court held that a wife may be awarded either lump sum or periodic alimony of such a substantial nature that the award reflects her share in the jointly accumulated assets. *Clark*, 293 So. 2d at 449.

[16] *Jones*, 532 So. 2d at 581.

[17] *Id.* at 582. (Prather, J., concurring).

[18] 519 So. 2d 1232 (Miss. 1988).

[19] *Parker*, 519 So. 2d at 1233.

[20] *Id.* at 1234.

[21] *Id.* On appeal the Mississippi Supreme Court stated that the record reflects that the appellant did not commit adultery while the parties were living together, but only after the marital relationship had been destroyed. *Id.* at 1236.

[22] *Id.* at 1235.

[23] *Id.* at 1236.

[24] *Id.* at 1235. MISS. CODE ANN. § 93-5-3 provides that: If a complainant or cross-complainant in a divorce action shall prove grounds entitling him to a divorce, it shall not be mandatory on any chancellor to deny such party a divorce, even though the evidence might establish recrimination on the part of such complainant or cross-complainant. MISS. CODE ANN. § 93-5-3 (1972).

C. Statutory Authority to Perform Rites of Matrimony

In the case of *Matter of Last Will & Testament of Blackwell*,[28] the Mississippi Supreme Court upheld the lower court's determination of validity of the marriage of Cobert C. Blackwell and Nadine B. Fortenberry.[29] The marriage ceremony was performed by a "minister" of the California-based Universal Life Church.[30] The sole qualification of the minister to perform rites of matrimony consisted of a certificate obtained by mail from the Universal Life Church.[31] The court refused to "establish some hard-edged line of demarcation prescribing minimum qualifications for one authorized to soleminize rites of matrimony . . . ."[32] Accordingly, the court held that the minister is "enough of a 'spiritual leader', and the Universal Life Church is enough of a 'religious body' that, in the eyes of the law of this state, Cobert C. Blackwell and Nadine B. Fortenberry became husband and wife. . . ."[33]

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[25] *Parker*, 519 So. 2d at 1236.

[26] *Id.* at 1236. Citing Moore, *An Examination of the Recrimination Doctrine*, 20 S.C.L. Rev. 685 at 714-15 (1968), the court outlined four policy justifications which have been given for the doctrine:

> (a) by rendering divorces more difficult to procure, recrimination promotes marital stability.
>
> (b) The rule tends to deter immorality since a spouse is less likely to commit adultery (or any other marital offense) if he knows that his misdeed may prevent him from obtaining a divorce at some future time.
>
> (c) The doctrine serves to protect the wife's economic status.
>
> (d) Recrimination prevents persons who are obviously poor marriage risks from being freed to contract - and probably ruin -another marriage.

Parker, 529 So. 2d at 1235-36.

[27] *Parker*, 529 So. 2d at 1236.

[28] 531 So. 2d 1193 (Miss. 1988).

[29] *Blackwell*, 531 So. 2d at 1194. Cobert C. Blackwell and Nadine B. Fortenberry were married on November 19, 1984. *Id.* Blackwell died less than three months later. *Id.* Blackwell left a will in which he devised real property to his first wife, Margaret (who had predeceased him), for life, remainder to his brothers and sisters. *Id.* Nadine renounced the will and requested a widow's allowance. *Id.* Appellees, Blackwell's brothers and sisters, challenged Nadine's right to a widow's allowance, alleging that she and Blackwell were not lawfully married. *Id.*

[30] *Id.* Miss. Code Ann. § 93-1-17 (1972) empowers "any . . . spiritual leader of any . . . religious body" to perform marriage ceremonies. Miss. Code Ann. § 93-1-17 (1972).

[31] *Blackwell*, 531 So. 2d at 1196. The Universal Life Church required no prerequisites for obtaining its "Credentials of Ministry" *Id.* Appellees contended that the minister is not a "spiritual leader" and the Universal Life Church is not a "religious body" within the meaning of the statute. *Id.* at 1194.

II. Wills and Estates

In 1988, the Mississippi Supreme Court rendered a number of decisions concerning wills and the administration of estates. Several of these decisions are significant in that they clarify the position of the court in several traditionally controversial areas, the most important of which is the doctrine of undue influence and confidential relationships. Four decisions of the court represent important developments in the law of undue influence and will be discussed in detail; however, the court also dealt with issues arising in the areas of illegitimacy,[34] adoptive children,[35] testamentary capacity,[36] accountings,[37] and bequeaths of cash.[38]

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[32] *Id.* at 1196.

[33] *Id.*

[34] Three cases in 1988 affected illegitimates: Primer v. Coleman, 521 So. 2d 863,869 (Miss. 1988) (where administrator of intestate estate knows of illegitimate children of intestate yet fails to serve notice to them of issuance of letters of administration, illegitimates not barred by time requirements of Miss. Code Ann. § 91-1-15(3)(c) (Supp. 1987)). *See* Estate of King, 501 So. 2d 1120, 1123 (Miss. 1987) (filing requirements for illegitimates presuppose good faith compliance by administrator with obligation imposed upon him by law to advise court and secure process upon all heirs known to him); *In re* Estate of Flowers, 493 So. 2d 950, 951 (Miss. 1986) (same); Miss. Code Ann. §§ 91-1-29 and 91-1-15(3)(c) (Supp. 1987). In *In re* Estate of Smiley, 530 So. 2d 18 (Miss. 1988) the court upheld Miss. Code Ann. § 91-1-15 (Supp. 1987), which creates a right of action in favor of illegitimate children. *Estate of Smiley*, 530 So. 2d at 23. *See* Trimble v. Gordon, 430 U.S. 762, 776 (1977) (establishing that as matter of equal protection, states are limited in their ability to restrict illegitimates' inheriting from their fathers). In *In re* Estate of Stutts, 529 So. 2d 177 (Miss. 1988) the court held that res judicata and collateral estoppel will not bar illegitimates from asserting their paternity under Miss. Code Ann. § 91-1-15 because it (1) is a newly created cause of action and (2) because the former determination of their nonpaternity was not essential to that judgment. *Estate of Stutts*, 529 So. 2d at 180.

[35] The only 1988 case related to the rights of adoptive children in the estate area was Posey v. Posey, 528 So. 2d 833 (Miss. 1988), which held that where a will devises realty to a donee "for the term of her natural life and then unto the heirs of her body," adoptive children of the devisee are excluded because they are not heirs of the body of the devisee. *Posey*, 528 So. 2d at 835-37.

[36] Edwards v. Edwards, 520 So. 2d 1370, 1373 (Miss. 1988) (where subscribing witnesses to will testify that testator had testamentary capacity at time he executed will, then that testimony is entitled to greater weight than testimony of witnesses who were

A. *Changes in the Presumption of Undue Influence/Confidential Relationship Doctrine*

In *Rockwell v. Watkins*,[39] the Mississippi Supreme Court stressed the importance of the testator's obtaining meaningful, independent advice in rebutting the presumption of undue influence which arises due to the presence of a confidential relationship.[40] The case arose out of the 1978 conveyance by seventy-eight year old Gertrude McCray of 365 acres including her home to her physician, leaving four siblings with no interest in any of her real property.[41] At trial, the evidence showed that McCray was elderly, obese, unmarried, suffered from diabetes, arteriosclerosis, arthritis, and congestive heart failure.[42] She also suffered from hallucinations for several months prior to the conveyance in question.[43] Finding that a fiduciary relationship existed between Miss McCray and her physician, Dr. Watkins, and that the doctor was the dominant figure in the relationship, the chancellor nevertheless determined that Dr. Watkins had successfully rebutted the presumption of undue influence based upon a finding that McCray had received independent counsel from a competent, disinterested person devoted to her interest, namely, her lawyer of many years, Reese.[44]

In reversing, the Mississippi Supreme Court found the conveyance to be presumptively void.[45] Finding that Reese lacked adequate knowl-

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not present at time of will's execution). *See* Humes v. Krauss, 221 Miss. 301, 310 72 So. 2d 737, 739 (1954) (test of testamentary capacity "is ability of testator at time to understand and appreciate nature and affect of his act, natural objects or persons to receive his bounty, and their relation to him, and is capable of determining what disposition he desires to make of his property"); Fortenberry v. Herrington, 188 Miss. 735, 747, 196 So. 232, 236 (1940) (subscribing witnesses may testify as experts on question of testamentary capacity); Scaloy v. Wardlow, 123 Miss. 857, 878, 86 So. 625, 626 (1920) (capacity tested as of date of execution of will); Brock v. Luckett's Executors, 5 Miss. (4 How.) 459, 482 (1840) (testimony of subscribing witnesses entitled to greater weight).

[37] *See infra* text accompanying notes 47-55.

[38] Zimmerman v. Corley, 519 So. 2d 430, 433 (Miss. 1988) (where bequeath of "cash" is included in will, such term will be interpreted to include certificates of deposit).

[39] 522 So. 2d 731 (Miss. 1988).

[40] *Rockwell*, 522 So. 2d at 738.

[41] *Id.* at 732. McCray left the property in her will to her siblings, who, upon her death, made a motion for the chancery court to set aside the conveyance. *Id.*

[42] *Id.* at 732-37.

[43] *Id.*

[44] *Id.* at 732.

[45] *Id.* at 737.

edge on which to base the advice given Miss McCray, the court held the presumption not rebutted.[46]

In *Angle v. Estate of Angle*,[47] the court focused on the burden of proof that must be sustained by a grantee/beneficiary in establishing the accuracy of his accounting.[48] The case came up when one sibling filed suit against another alleging that the defendant had obtained an interest in certain real estate belonging to their mother, Mrs. Ina M. Angle, through the use of undue influence.[49] The lower court found that Mrs. Angle was totally dependent on the appellant/defendant and that therefore a confidential relationship existed between the appellant and his mother.[50] The court therefore set aside certain conveyances of real estate by Mrs. Angle to the appellant, and additionally ordered the appellant to file an accounting for all rents, profits and expenses with regard to the properties and to account for all other cash funds and personal property of Mrs. Angle which were held and managed by him to the time of trial.[51] The appellees objected to the accounting that was filed asserting that it was untimely, insufficient, and submitted in bad faith.[52] The chancellor agreed that the accounting was substantially incomplete and ordered Angle to pay $34,536.56 to the estate.[53]

Citing *Mullins v. Ratliff*,[54] the Mississippi Supreme Court affirmed the chancellor, holding that appellant Angle failed to meet his burden of proof in that he failed, by clear and convincing evidence, to properly account for monies he spent belonging to his mother.[55]

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[46] *Id.* at 740 (citing Murry v. Laird, 446 So. 2d 575, 578-79 (Miss. 1984)).

[47] 519 So. 2d 883 (Miss. 1988).

[48] *Angle*, 519 So. 2d at 885.

[49] *Id.* at 883.

[50] *Id.* at 884.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] 515 So. 2d 1183 (Miss. 1987). In Murray v. Laird, 446 So. 2d 575 (Miss. 1984) the court explained that the existence of a confidential relationship gives rise to a presumption of undue influence. Consequently, the burden of going forward with the proof shifts to the beneficiary to prove by clear and convincing evidence:

(1) good faith on the part of the grantee/beneficiary;

(2) grantor's full knowledge and deliberation of his actions and their consequences; and

(3) advice of (a) a competent person (b) disconnected from the grantee and (c) devoted wholly to the grantor/testator's interest.

Murray, 446 So. 2d at 578. *Mullins* modified the third prong of the above test by requiring that the grantee/beneficiary prove by clear and convincing evidence that the grantor/testator exhibited "independent consent and action." *Mullins*, 515 So. 2d at 1193.

In what can only be seen as a retreat from the steady expansion of the confidential relationship doctrine over the years, which had created a situation in which it was doubtful that any elderly or infirm person could make a will that could not be successfully challenged,[56] the Mississippi Supreme Court handed down *Simm v. Adams*.[57] In *Simm*, the testator left a will naming Lucille Simm as executrix and sole beneficiary.[58] It was stipulated that a confidential and fiduciary relationship existed between the testator and Simm.[59] In invalidating the will, the chancellor held that Simm had failed to overcome the presumption of undue influence which arose from the confidential relationship which existed between Simm and the testator.[60]

The Mississippi Supreme Court reversed, finding that there was no evidence showing that Simm asserted any influence whatsoever over the testator in the preparation or execution of the will.[61] Thus, the court invoked the "active participation" doctrine,[62] and finding none, gave effect to the intent of the testator as found in the will and allowed it to be admitted to probate.[63]

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[55] *Estate of Angle*, 519 So. 2d at 885.

[56] Traditionally, the confidential relationship could be proven by evidence that (1) a traditional confidential relationship existed between the testator and the beneficiary, and (2) that the beneficiary was an "active participant" in the making of the will. *See* McQueen v. Wilson, 131 Ala. 606, 31 So. 94 (1901); R.A. WEEMS, MISSISSIPPI WILLS AND ESTATES: CASES, STATUTES AND MATERIALS § 8-7 at 256 (1983). In Croft v. Alder, 237 Miss. 713, 115 So. 2d 683 (1959), the Mississippi Supreme Court held that the presumption arose in a situation where there was no traditional fiduciary relationship. *Croft*, 237 Miss. at 713, 115 So. 2d at 683. Subsequently, in *In re* Will of Moses, 227 So. 2d 829 (Miss. 1969), the court held that the presumption could arise "where the relationship is coupled with some suspicious circumstances such as mental infirmity of the testator." *Moses*, 227 So. 2d at 835. Thus the court used the "suspicious circumstances doctrine" in place of the need for showing active participation by the beneficiary, thereby placing a will contestant in an even more favorable position. *Id.* at 836. The Mississippi Supreme Court made the proponent's burden even more onerous in Murray v. Laird, 446 So. 2d 575 (Miss. 1984). *See supra* note 54. Cases after *Murray* seem to show a pattern in which the court has relaxed the burden on the proponent. *See* Estate of Haney, 516 So. 2d 1359, 1361 (Miss. 1987) (upheld finding that facially valid will should not be overturned); Mullins v. Ratcliff, 515 So. 2d 1183, 1184 (Miss. 1987) (sufficient mental capacity and lack of evidence of dominance overcame presumption); Costello v. Hall, 506 So. 2d 293, 297 (Miss. 1987) (court refused to impose presumption simply because of power-of-attorney).

[57] 529 So. 2d 611 (Miss. 1988).

[58] *Sims*, 529 So. 2d at 612. Simm had been the testator's housekeeper for approximately five years prior to his death. *Id.*

[59] *Id.* at 613.

[60] *Id.*

[61] *Id.* at 615.

[62] *Id.*; *see supra* note 56 (discussing "material participation" doctrine).

The court retreated even further from the presumption in *Miner v. Bertasi.*[64] In *Bertasi,* the ninety-two year old grantor, Adelino Bertasi, Sr., executed a deed on his farm to his two sons Anthony and Adelino, Jr.[65] Upon Adelino, Sr.'s death in 1982, Rosetta Minor, one of Adelino Sr.'s four children, sued her two brothers challenging the conveyance of the farm from Adelino, Sr. to his sons on the ground of undue influence.[66] The chancellor found that no confidential or fiduciary relationship existed between Adelino, Sr. and Anthony because their relationship did not involve one of the traditional bases of fiduciary relationships, such as attorney-client, guardian-ward, or trustee-beneficiary.[67]

The Mississippi Supreme Court rightly held that a presumption of undue influence should have arisen in the case because there appeared "weakness, dependence, or trust, justifiably reposed" from Adelino, Sr. to Anthony arising from Adelino, Sr.'s financial and physical dependence on Anthony.[68] Furthermore, the court found that both sons "actively participated" in the transaction because Anthony paid five dollars to Adelino, Sr. on Adelino, Jr.'s behalf and five dollars on his own behalf as consideration for the deed.[69] In spite of this, the court upheld the deed, finding from the evidence that Adelino, Sr. was "sharp, strong-willed and not susceptible to outside influence."[70] Thus the presumption of undue influence was successfully rebutted.[71]

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[63] *Id.*

[64] 530 So. 2d 168 (Miss. 1988).

[65] *Miner,* 530 So. 2d at 169. Anthony was present when Adelino, Sr. signed the deed, but Adelino, Jr. was not. *Id.* at 169-70. Adelino, Sr. received advice from one John Masserano, Anthony's son-in-law and an attorney. *Id.* It should also be noted that Adelino, Sr. lived with Anthony. *Id.*

[66] *Id.*

[67] *Id.* at 170.

[68] *Id.* The court stated that fiduciary or confidential relationships can arise in a legal, moral, domestic, or personal context, where there appears "on the one side an overmastering influence or, on the other, weakness, dependence, or trust, justifiably reposed." *Id.* at 170 (quoting Estate of Haney, 516 So. 2d 1359, 1361 (Miss. 1987); Mullins v. Ratcliff, 515 So. 2d 1183, 1191 (Miss. 1987); *In re* Estate of Bilello, 317 So. 2d 916, 917 (Miss. 1975)). Thus the court rejected the requirement of the "transaction of some business" characterized as attorney/client, guardian/ward, etc. *Id.* at 170.

[69] *Id.* at 171.

[70] *Id.* at 171-72.

[71] *Id.* The court was satisfied that Adelino, Jr. and Anthony had, by clear and convincing evidence, rebutted the presumption by meeting the *Murray* factors. *Id.* at 171-72; *see Murray,* 446 So. 2d at 578.

III. INSURANCE LAW

A. *Punitive Damages*

The issue of whether or when to award punitive damages against insurance companies remained very much in the court's attention in 1988.

In *Independent Life & Accident Ins. Co. v. Peavy*,[72] the appellant insurance company issued a $10,000 life insurance policy on the appellee.[73] The policy provisions included a waiver of premium in case of disability, and double indemnity in case of accidental death.[74] If the premium became waived, the double indemnity was lost.[75] In order to obtain the benefit of the waiver of premium provision, the insured was required to notify the company in writing of his disability during the period of total disability.[76] After becoming totally disabled in 1979, the appellee, in 1980, filed a claim for waiver of premium which was returned because it was not on the correct form.[77] The appellee's insurance agents, Watson and Davis, persuaded the appellee not to file the correct form for two reasons, one of which was true, i.e., that by filing for waiver of premium the insured would forfeit the double indemnity provision of his policy.[78] The other reason given was false, which was that if, *at any time* he thought he could not pay the premiums, then the insured needed only to submit the claim form.[79] In April, 1982, after the insured was no longer totally disabled but rather partially disabled, the appellee filed a claim.[80] Because the claim was not submitted during the period of total disability, the appellant insurance company denied the claim.[81] The trial court awarded the appellee

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[72] 528 So. 2d 1112 (Miss. 1988).

[73] *Peavy*, 528 So. 2d at 1113.

[74] *Id.*

[75] *Id.*

[76] *Id.* The provision read in pertinent part:

> NOTICE OF CLAIM: No claim for benefits hereunder shall be valid unless total disability is established as provided elsewhere herein and written notice thereof is given to a received by the Company during the lifetime of the Insured and *during the continuance of total disability.*

Id. at 113-14 (emphasis added).

[77] *Id.* at 1114. Peavy was injured while working for Pearl Steel Erectors. *Id.* at 1113. The injury occurred when a 3500-pound steel beam fell on his leg. *Id.*

[78] *Id.* at 1114.

[79] *Id.* (emphasis added). At trial, the agents denied telling Peavy that he could wait to submit the claim. *Id.*

[80] *Id.*

[81] *Id.* The policy defined total disability as:

> [I]ncapacity to engage in any occupation for remuneration or profit which inca-

$250,000 in punitive damages.[82]

The Mississippi Supreme Court agreed that the facts presented amounted to a breach "attended by intentional wrong, insult, abuse or such gross negligence as to consist of an independent tort."[83] Although the appellant technically had an arguable reason to deny the claim, the actions of its agents, Watson and Davis, would be attributed to it, and those actions gave rise to the punitive damages claim.[84] In so awarding punitive damages, the court rejected the appellant's argument that the punitive damages should bear a reasonable relationship to actual damages in order not to be arbitrary or unreasonable.[85]

In *Life & Casualty Co. of Tennessee v. Bristow*,[86] the Mississippi Supreme Court held that where an insurer relies on the statements of an insured's physician in making decisions about benefits under the "own occupation/any occupation"[87] provisions of a disability policy,

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> pacity is the result of bodily injury or disease suffered or contracted after the date of this disability provision; . . . .

Id.

[82] *Id.* at 1115.

[83] *Id.* (citing Fedders v. Boatright, 493 So. 2d 301, 311 (Miss. 1986)). The court noted that punitive damages are assessed as an example and warning to others and thus are to be allowed with caution. *Id. See* Gardner v. Jones, 464 So. 2d 1144, 1148 (Miss. 1985) (punitives should only be awarded in extreme cases); Consolidated Am. Life v. Toche, 410 So. 2d 1303, 1304 (Miss. 1982) (punitives should be awarded cautiously); Progressive Casualty Ins. Co. v. Keyes, 317 So. 2d 396, 398 (Miss. 1975) (when punitive damages are appropriate in action for breach of contract).

[84] *Peavy*, 528 So. 2d at 1115. Normally, the existence of an arguable reason for refusing to pay a claim is a good defense. *See* State Farm Fire and Casualty Co. v. Simpson, 477 So. 2d 242 (Miss. 1985); *Progressive Casualty*, 317 So. 2d at 396. That an insurer may be held liable for actual and punitive damages based on its agents' actions is supported by National Life & Accident Ins. Co. v. Miller, 484 So. 2d 329, 334 (Miss. 1985) (insurer denied claim because policy application form failed to reveal insured's heart murmur; omission was responsibility of soliciting agent, who was aware of murmur).

[85] *Peavy*, 528 So. 2d at 1120. Appellant's argument was based on cases from other jurisdictions which arguably required some relation between the amount of punitive damages and the amount of actual damages. *See, e.g.*, Johnson v. American Liability Ins. Co., 335 F. Supp. 390 (W.D. Mo. 1971); Dowling v. J.C. Penney Co., 300 F. Supp. 307 (W.D. Pa. 1969); Wegner v. Rodeo Cowboys Assoc., 290 F. Supp. 369 (D. Colo. 1968).

[86] 529 So. 2d 620 (Miss. 1988).

[87] *Bristow*, 529 So. 2d at 621. These provisions in the policy in question read as follows:

> Total disability means the complete inability of the insured to perform the duties of his *regular occupation*, except if indemnities have been paid for 24 months of a continuous disability, then . . . "total disability" shall mean the complete inability of the insured to perform the duties of *any occupation* for which he is reasonably fitted by his education, training and experience . . . .

the insurer had arguable grounds for denying benefits under the policy and thus punitive damages were not available.[88] The appellee, Bristow, an electrician, broke his arm in 1980.[89] The appellant (Life and Casualty) issued total disability benefit checks for twenty-four months before reviewing Bristow's file to determine whether Bristow was unable to perform the duties of any occupation for which he was reasonably fitted.[90] Bristow's own physician informed Life and Casualty that while Bristow was still totally disabled as to his regular occupation, he was not totally disabled from other occupations that "did not involve heavy manual work, working on ladders, or with overhead objects."[91] Based on these statements, Life and Casualty discontinued disability payments.[92] Feeling aggrieved, Bristow brought suit seeking compensatory and punitive damages.[93] The trial court awarded Bristow $50,000 in compensatory damages for emotional distress and six million dollars in punitive damages for his bad faith claim against the insurance company.[94]

In response to Life and Casualty's argument that the issue of punitive damages should never have been submitted to the jury, the Mississippi Supreme Court agreed and reversed the trial court.[95] The court enunciated the test of Mississippi law for deciding whether or not the question of punitive damages should go to the jury. The court applied a two-step test: (1) there must be a finding that the insurance company had no "legitimate or arguable reason to deny payment of the claim,"[96] and (2) there must be a "showing of malice, gross negligence, or wanton disregard for the rights of the insured."[97] The court then concluded that where an insurer relied on the statements of the insured's physician in making decisions about benefits under a disability policy, the insurer had an arguable reason for denying benefits under the policy.[98]

Id. at 621 (emphasis added).

[88] *Id.* at 624.

[89] *Id.* at 621.

[90] *Id.* at 621-22.

[91] *Id.* at 622.

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.* at 625.

[96] *Id.* at 622 (quoting Reserve Life Ins. Co. v. McGee, 444 So. 2d 803, 809 (Miss. 1983); Blue Cross/Blue Shield of Miss. v. Campbell, 466 So. 2d 833, 842 (Miss. 1984)).

[97] *Id.* at 622 (citing Pioneer Life Ins. Co. of Ill. v. Moss, 513 So. 2d 927, 930 (Miss. 1987)). Both of these questions are questions of law, to be decided by the trial judge. *Id.* at 623 (citing *Pioneer Life*, 513 So. 2d at 930).

[98] *Id.* at 624. Additionally, the court found that there was no substantial evidence to

B. *Stacking of Uninsured Motorist Coverage*

In the area of uninsured motorist coverage, insurance companies continued to argue in 1988 that "stacking" of coverage should not be allowed, but the Mississippi Supreme Court continued to reject that argument. In *Wickline v. U.S. Fidelity & Guaranty Co.*,[99] the decedent guest passenger Stacy Wickline was killed when the car in which she was riding crashed into a parked car.[100] The driver of the car was Mills Carter, III and the owner Mills Carter, Jr.[101] The Carter vehicle was covered by a liability/uninsured motorist (UM) policy issued by United States Fidelity and Guaranty Company (USF&G).[102] The Carters owned four vehicles, all of which were covered under the UM policy up to $10,000 per person or $20,000 per accident.[103] The decedent's mother and sister sued USF&G, claiming that each was entitled to the $10,000 per person UM limit on each of the four Carter vehicles, or a total of $80,000.[104] The trial court held that the Wicklines could not "stack" the coverage for all four vehicles covered under the USF&G UM policy.[105]

On appeal, the Mississippi Supreme Court initially addressed the question of whether the Carter vehicle was an uninsured vehicle. The court noted that section 83-11-103(c)(iii) of the Mississippi Code incorporated the "underinsured" motorist concept, which compares the limits of the tortfeasor's liability coverage to the limits applicable to the injured person provided under his UM coverage.[106] Since the liability

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support Bristow's claim for compensatory damages for mental distress, noting that such damages cannot be considered in the absence of finding "an independent intentional tort suffered from the breach of contract." *Id.* (citing Blue Cross and Blue Shield of Miss., Inc. v. Maas, 516 So. 2d 495, 498 (Miss. 1987); Aetna Casualty & Surety Co. v. Day, 487 So. 2d 830, 835 (Miss. 1986); State Farm Fire & Casualty Co. v. Simpson, 477 So. 2d 242, 250 (Miss. 1985)).

[99] 530 So. 2d 708 (Miss. 1988).

[100] *Wickline*, 530 So. 2d at 710.

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.* Immediately after the accident, USF&G paid Stacy Wickline's survivors $10,000 as limits of its liability per person coverage. *Id.* The Wicklines, however, sought to recover the $10,000 limit on each of the four Carter vehicles (totaling $40,000 for each of them, or $80,000 total). *Id.*

[105] *Id.* at 711.

[106] *Id.* at 712. MISS. CODE ANN. § 83-11-103 defines "uninsured motor vehicle" as:

> (iii) an insured motor vehicle, when the liability insurer of such vehicle has provided limits of bodily injury liability for its insured vehicle which are less than the limits applicable to the injured person provided under his uninsured motorist coverage . . . .

limits for the Carter vehicle were less than the limits applicable to Stacy Wickline (her own State Farm policies plus Carter's USF&G liability policies),[107] the Carter vehicle was an "underinsured" vehicle.[108] The court agreed that the Wicklines were "insureds," rejecting the distinction between "class one" and "class two" insureds found in some earlier cases.[109] USF&G argued that because Stacy Wickline did not pay any premiums, it would be unjust to allow her to stack,[110] but the court disposed of this argument by using a third-party beneficiary theory.[111] The court noted that stacking of multiple coverages within a single policy has been mandated in Mississippi by prior case law.[112] The court further stated that since Mills Carter, Jr. paid the premiums for the benefit of all insureds, including the statutory UM beneficiary Stacy Wickline, USF&G would reap an unfair advantage if it were able to deny stacking in this case.[113]

MISS. CODE ANN. § 83-11-103(c)(iii) (Supp. 1988). The phrase "applicable to the injured person" in turn means that if an injured person is insured under more than one policy of uninsured motorist coverage, the limits of each such policy are applicable to him. Harthcock v. State Farm Mut. Automobile Ins. Co., 248 So. 2d 456, 462 (Miss. 1971). According to the court, if the injured person is injured while riding as a passenger, the uninsured motorist coverage of the vehicle in which he is riding, in addition to that of his own vehicles, is "applicable to the injured person". *Wickline*, 530 So. 2d at 713 (citing Southern Farm Bureau Casualty Ins. Co. v. Roberts, 323 So. 2d 536 (Miss. 1975)).

[107] *See supra* note 106.

[108] *Wickline*, 530 So. 2d at 713.

[109] *Id.* at 714. MISS. CODE ANN. § 83-11-103(B) defines "insureds" as:

> [T]he named insured and, while resident of the same household, the spouse of any such named insured and relatives of either, while in a motor vehicle or otherwise, any person who uses, with the consent, express or implied of the named insured, the motor vehicle to which the policy applies, and a guest in such motor vehicle to which the policy applies, or the personal representative of any of the above.

MISS. CODE ANN. § 83-11-103 (B) (Supp. 1988). The trial court had determined that the statute created two classes of insureds, i.e., the named insured and his family as opposed to anyone else coming under the statutory definition. *Wickline*, 530 So. 2d at 714. The trial court then decided that, since Wickline had no connection with the other three Carter vehicles and was not a Carter family member, no stacking would be permitted. *Id.* at 714. Earlier cases making this distinction to which the court referred, were Aetna Casualty & Surety Co. v. Barker, 451 So. 2d 731 (Miss. 1984); Lowery v. State Farm Mutual Automobile Ins. Co., 285 So. 2d 767 (Miss. 1984). *Wickline*, 530 So. 2d at 714.

[110] *Wickline*, 530 So. 2d at 714.

[111] *Id.*

[112] *Id.* The court noted that stacking had become a "positive gloss" upon Mississippi's uninsured motorist act. *Id.* (citing Brown v. Maryland Casualty Co., 521 So. 2d 854 (Miss. 1987); Pearthree v. Hartford Accident and Indemn. Co., 373 So. 2d 267 (Miss. 1979); Hartford Accident and Indemn. Co. v. Bridges, 350 So. 2d 1379 (Miss. 1977)).

[113] *Id.* at 714.

Finally, the court agreed with USF&G's contention that the plaintiffs were not each entitled to recover the per person policy limits. Because of the derivative nature of their claim, the plaintiffs had to recover by way of representation, and not per capita.[114]

C. Burden of Proof in Civil Arson Cases

In *McGory v. Allstate Insurance Co.*,[115] the insureds bought a fire insurance policy from Allstate Insurance Company (Allstate) covering some residential rental property and an adjacent bar-b-que restaurant.[116] Subsequently, the residential property was substantially damaged by fire.[117] Allstate filed a declaratory action seeking an adjudication of non-liability because, it alleged, the McGorys had intentionally burned the building.[118] The jury was instructed that Allstate was entitled to void coverage if they could prove by a preponderance of the evidence that the insureds had burned their own property.[119]

Finding no justification for a distinction between civil arson and other types of common law fraud, the supreme court reversed, holding that the traditional fraud standard of "clear and convincing" was proper.[120]

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[114] *Id.* The court also held that USF&G was entitled to an offset of the liability payments made. *Id.* at 717.

[115] 527 So. 2d 632 (Miss. 1988).

[116] *McGory*, 527 So. 2d at 633.

[117] *Id.*

[118] *Id.* at 634. At trial, two firemen and an expert testified that the fire was incendiary (deliberate), and had been started with an accelerant. *Id.* The evidence showed that at the time of the fire, the insureds were in debt over $50,000, had allowed several other insurance policies to lapse, and the policy covering the damaged property was due for cancellation. *Id.* On the day of the fire, the insured called his agent to be sure that the coverage on the residential property was still in effect. *Id.* at 636. No evidence was adduced at trial, however, that the insured had hired someone to burn the property, and both insureds had solid alibies for the time of the fire. *Id.*

[119] *Id.* at 638. The jury instruction read in pertinent part: "The court instructs the jury that under Mississippi law if an insured intentional caused the burning of his insured property he may not recovery [sic] the proceeds of any insurance policy insuring said property against fire loss; and if you find from a preponderance of the evidence . . . ." *Id.* at 638 n.1.

Mississippi law allows arson to be proved circumstantially. *Id.* at 634. There are three elements of the circumstantial claim: (1) an incendiary fire; (2) motive of the insured to destroy the property; (3) evidence that the insured had the opportunity to set the fire or to procure its being set by another. *Id.* at 635 (citing, *inter alia*, Davidson v. State Farm Fire & Casualty Co., 641 F. Supp. 503, 507 (N.D. Miss. 1986); Vicksburg Furniture Mfg. Ltd., v. Aetna Casualty & Surety Co., 625 F.2d 1167, 1171-72 (5th Cir. 1980)). The court held that the circuit court properly denied the McGory's motion for judgment notwithstanding the verdict even though Allstate put forward no proof as to the third leg of the three-part test. *Id.* at 636-37.

D. *Duty of Liability Insurance Carrier to its Insured to Settle a Lawsuit Within Policy Limits*

In *Hartford Accident & Indemnity Co. v. Foster*,[121] the Mississippi Supreme Court attempted to clearly delineate the responsibilities of insurance companies and defense attorneys to an insured under a liability policy where there has been an offer to settle a lawsuit against the insured below the policy limits. In a rather lengthy and confusing opinion, the court held that where an offer of settlement is made within the liability policy limits, the insurer has a fiduciary duty to look after the insured's interest at least to the same extent as its own,[122] and that defense attorneys hired by the carrier are its agents for whom it has the customary legal liability.[123] Their duty is to fully disclose the conflict of interest to both parties and to inform the insured of his need for his own counsel, and then to evaluate the case with competency and utmost good faith, with the best interest of both clients in mind.[124]

The case arose when a truck owned and operated by Foster's Furniture Business and driven by an employee collided with a car operated by one Sims, whose arm was severely injured.[125] Sims sued Foster, who was insured by Hartford up to $50,000.[126] Hartford hired Jackson attorney Curtis Coker to represent the insured.[127] The weakness of Sims' case was evidenced by the fact that during the trial he offered to settle three times.[128] All the offers were below the $50,000 policy limit, so it was in Foster's interest to settle.[129] There was a factual dispute as to whether Foster was informed of the second and third offers.[130] Because Coker and Hartford thought they had a strong case, they refused to settle for more than $25,000.[131] Sims' lowest offer was $30,000.[132] There was no evidence that Foster would have been willing to make up the difference.[133] The trial proceeded to a verdict and judgment thereon was entered in the amount of $80,000 against Foster,[134] who in turn sued Hartford and his lawyers in Simpson County,[135] winning on theories of bad faith refusal to settle and breach of a lawyer's fiduciary duty to him in declining a reasonable settlement offer.[136]

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[120] *Id.* at 636. The court remanded the case for retrial using the "clear and convincing standard in the jury instruction." *Id.* at 640.

[121] 528 So. 2d 255 (Miss. 1988).

[122] *Foster*, 528 So. 2d at 265. Two earlier opinions, Farmer's Gin Co. v. St. Paul Mercury and Indemn. Co., 186 Miss. 747, 191 So. 415 (1939) and Georgia Casualty Co. v. Cotton Mills Products, 159 Miss. 396, 132 So. 73 (1931) contained statements contrary to the court's pronouncement of the insurer's duty, so to the extent that the holdings in these cases are contrary to *Foster* the court expressly overruled them. *Foster*, 528 So. 2d at 265.

[123] *Id.* at 268.

[124] *Id.* at 273.

[125] *Id.* at 257.

[126] *Id.*

[127] *Id.* at 258.

[128] *Id.* at 260-61.

[129] *Id.*

The Mississippi Supreme Court found that as to Hartford, there was simply no evidence of bad faith on its part in rejecting the offer, because, based on its attorneys' evaluation, it had every reason to believe that its insured was not at fault.[137] The question then became whether Hartford should be liable for the actions of its attorneys in their breach of fiduciary duty to Foster, through principles of respondeat superior.[138] The court held that Hartford would be liable for the negligence or bad faith of its attorneys had they breached these duties to Hartford's insured.[139] The court found, however, that there was no such breach in this case.[140] The court then stated the proper procedure for the lawyer who finds himself in this situation: He or she should halt proceedings until a decision can be made; he or she then is to fully disclose to each client the terms of the settlement offer and the ramifications thereof; particularly, he should point out to the insured his need for his own counsel. If this is done, the attorney should not then be prohibited from honestly and carefully answering questions pertaining to the law and facts, including his impression of the strengths and weaknesses of the case.[141] In the instant case, the court found that Foster had failed to show how he was damaged since there was no evidence that he would have been willing to pay the difference between Hartford's offer of $25,000 and Simm's offer of $30,000.[142]

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[130] *Id.* at 261.

[131] *Id.*

[132] *Id.*

[133] *Id.* at 262-63. This fact is of significance since by paying the $5,000 difference Foster could have avoided having to pay the $30,000 excess over the policy limits which he was required to pay.

[134] *Id.* at 259.

[135] *Id.* at 260.

[136] *Id.* at 263.

[137] *Id.* at 266.

[138] *Id.* at 267-68.

[139] *Id.*

[140] *Id.* at 275-76.

[141] *Id.* at 273. In answering the question of the attorney's duty in this situation, the court turned to the Mississippi Code of Professional Conduct. *Id.* at 268. The rule on conflicts of interest is Rule 1.7 which reads:

The dissenting justices[143] would have imposed a duty on Hartford to, *inter alia*, settle Sims' claim within the policy limits "on objectively reasonable terms," the definition of which the dissent would leave to the jury.[144] The dissenters would impose a duty on the attorneys to try as best they could to persuade the insurer to settle the case within the policy limits.[145] Justice Robertson went even further by saying that the lawyer's duty is to the insured to the exclusion of the insurer if the lawyer does not limit the scope of his representation as provided by Mississippi Rule of Professional Conduct 1.2(a) and (c).[146]

> "(a) a lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless the lawyer reasonably believes: (1) the representation will not adversely affect the relationship with the other client; and (2) each client has given knowing and informed consent after consultation. The consultation shall include explanation of the implications of the adverse representation and the advantages and risks involved.
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest, unless the lawyer reasonably believes: (1) the representation will not be adversely affected; and (2) the client has given knowing and informed consent after consultation . . . .

MISS. CODE OF PROFESSIONAL CONDUCT Rule 1.7.

[142] *Foster*, 528 So. 2d at 275. *See supra* note 133 and accompanying text.

[143] Justice Prather dissented, joined by Dan Lee, as to the liability of Hartford, and Robertson, who dissented with a separate opinion. Justice Sullivan did not participate. *Foster*, 528 So. 2d at 276.

[144] *Id.* at 282-83 (Prather, J., dissenting).

[145] *Id.* at 290 (Robertson, J., dissenting).

[146] *Id.* at 292 (Robertson, J., dissenting). Mississippi Rule of Professional Conduct 1.2(c) deals with the lawyer's prerogative to limit the scope of his representation of a client who consents after consultation. It reads:

> (c) A lawyer may limit the objectives of the representation if the client consents after consultation.

The official comment to Model Rule 1.2(c) states in pertinent part:

> (1) The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client . . . . When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage . . . .

Id. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(c) Comment (1983). Justice Robertson would have ruled that because Coker did not so limit his scope of representation to Foster, Foster was his *only* client. *Foster*, 528 So. 2d at 292 (Robertson, J., dissenting).

E. Other Insurance Cases

Other insurance cases were handed down in 1988 covering a broad range of issues.[147]

IV. MISCELLANEOUS

In 1988, the Mississippi Supreme Court decided miscellaneous cases regarding taxation,[148] Mississippi constitutional questions,[149] federal constitutional questions,[150] trusts,[151] attorney fees,[152] and issuance of school bonds.[153]

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[147] These insurance cases are: Mink v. Andrew Jackson Casualty Ins. Co., 537 So. 2d 431, 434 (Miss. Dec. 21, 1988) (summary judgment improper where alleged that agent was acting as agent for insured when he secured coverage on ordinarily uninsurable structure - agency relationships are questions of material fact); State Farm Mutual Auto Ins. Co. v. Mettetal, 534 So. 2d 189, 194 (Miss. 1988) (Motor Vehicle Safety Responsibility Law, MISS. CODE ANN. § 63-15-43 (1972 & Supp. 1987), does not apply to all automobile liability insurance policies, but only to those certified as proof of financial responsibility) (*overruling*, United States Fidelity & Guaranty Co. v. Stafford, 253 So. 2d 388 (Miss. 1971), State Farm Mutual Auto. Ins. Co. v. Moore, 289 So. 2d 909 (Miss. 1974) and Vaughn v. State Farm Mutual Auto. Ins. Co., 359 So. 2d 339 (Miss. 1978); State Farm Ins. Co. v. Gay, 526 So. 2d 534, 538 (Miss. 1988) (proof of mailing satisfies notice requirement for cancellation of insurance policy due to non-payment); State Farm Auto. Ins. Co. v. Gregg, 526 So. 2d 554, 558 (Miss. 1988) ("med pay" provision which covered "medical expenses" as well as health care expenses other than those provided by a physician; chiropractic expenses are covered); Tew v. Dixieland Finance, Inc., 527 So. 2d 665, 673 (Miss. 1988) (corporate creditors not allowed to receive commission payments or be licensed as insurance agents to write credit life and disability insurance-prospective-effective July 1, 1989); Colonial Mortgage Co. v. Lee, 525 So. 2d 804, 808 (Miss. 1988) (punitive damages not appropriate where reasonable, hypothetical trier of fact could not have found either malice, gross neglect or reckless disregard); Estate of Osborn v. Gerling Global Life Ins. Co., 529 So. 2d 169, 172 (Miss. 1988) (where reinsurance contract's language shows intent to share liabilities rather than strictly to indemnify, reinsurer is directly liable to policy holders of reinsuring company); Mississippi Ins. Guaranty Ass'n. v. Vaughn, 529 So. 2d 540, 543 (Miss. 1988) (disability insurance is synonymous with accident and health insurance for purposes of coverage under Mississippi Insurance Guaranty Association Law); Coleman v. Sanford, 521 So. 2d 876, 877 (Miss. 1988) (intentional shooting on highway not covered by uninsured motorist policy); Sanford v. Federated Guaranty Ins. Co., 522 So. 2d 214, 217 (Miss. 1988) (where false statement by insured on application is representation, not warranty, lack of materiality is question of fact which can preclude rescission).

[148] *See* Commissioner v. Bounds, 528 So. 2d 822, 827 (Miss. 1988) (taxpayer's uncorroborated testimony that he sold goods at or below cost, coupled with failure to keep adequate records, does not overcome Commissioner's prima facie correct assessment).

[149] *See* Burrell v. Miss. State Tax Comm'n, 536 So. 2d 848, 859 (Miss. 1988) (where multiple constitutional amendments relate to same subject matter, such amendments may be voted on by voters as a single amendment under Miss. Const. § 273 (1890)); Smith v. Dorsey, 530 So. 2d 5, 7 (Miss. 1988) (contracts between school board and spouses of its members violated Miss. Const. § 109 (1890)).

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[150] *See* Wicks v. Mississippi Valley State University, 536 So. 2d 20, 23 (Miss. 1988) (where neither state law, regulation, nor university policy create legitimate expectation of continued employment for non-tenured university professor, but instead vests tenure decision within sole discretion of administrator, there is no legitimate constitutionally protected property interest in grant of tenure); Collier v. Shell Oil Co., 534 So. 2d 1015, 1018 (Miss. 1988) (Equal Protection Clause, read after Trimble v. Gordon, 430 U.S. 762 (1977), not applied retroactively so as to deprive bona fide purchases of their interest in land); Jones v. Board of Trustees, 524 So. 2d 968, 972 (Miss. 1988) (when student faces suspension or expulsion, minimum due process requires notice and opportunity to be heard, however, denial of procedureal due process will not be found unless aggrieved party can show substantial prejudice).

[151] *See* Walker v. Cox, 531 So. 2d 801, 804 (Miss. 1988) (hostility on part of trustee toward income beneficiary is proper ground for removal of trustee).

[152] *See* Bondafoam v. Cook Const. Co., 529 So. 2d 655, 659 (Miss. 1988) (where there is no statutory nor contractual basis for award of attorney's fees and where defendant has not acted with such reckless or wanton disregard for plaintiff's rights as to justify punitive damages, attorney's fees may not be awarded).

[153] *See* In Re Validation of 19,800,000 General Obligation School Bonds, Series 1987, Madison County, MS dated November 1, 1987, 534 So. 2d 1025, 1027 (where school board's resolution of intent to issue general obligation school bonds set out approximate amount of indebtedness to be incurred, and purpose for which money so borrowed was to be expended, school board's resolution was sufficiently specific to obtain judicial validation of bonds).

PROPERTY

During 1988, the Mississippi Supreme Court issued property related decisions in the areas of conveyances and the construction of conveyances,[1] matters affecting title,[2] eminent domain,[3] easements,[4] zoning actions,[5] sixteenth section lands,[6] and oil and mineral interests.[7] The majority of the issued opinions made no change in Mississippi property law; those cases will only be treated in footnotes. Textual treatment will be given to five opinions which have affected Mississippi law[8] or have provided new statutory interpretations.[9] Also, two opin-

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[1] *See* Whittington v. Whittington, 535 So. 2d 573, 587 (Miss. 1988) (subsequent grantee's right to deferred bonuses under prior lease); Manson v. Magee, 534 So. 2d 545, 547-48 (Miss. 1988) (unambiguous conveyance will not be construed to convey interest greater than that possessed by grantor); Walters v. Petterson, 531 So. 2d 581, 584 (Miss. 1988) (one must establish retention of possession by clear, unequivocal, convincing evidence; then prove contract to reconvey to defeat deed absolute on face); Knox v. Shell Western E & P, Inc. 531 So. 2d 1181, 1185 (Miss. 1988) (terms of deed absolute on face properly interpreted by chancellor); Deason v. Cox 527 So. 2d 624, 626 (Miss. 1988) (reserving interest not possessed by grantor creates ambiguity which must be construed against grantor); C & D Inv. Co. v. Gulf Transp. Co., 526 So. 2d 526, 528-29 (Miss. 1988) (wait and see doctrine followed where required contingency for interest to vest actually occurs during perpetuity period); Burch v. Hillman, 525 So. 2d 396, 399 (Miss. 1988) (extrinsic evidence admitted where deed is unclear or ambiguous); Thornhill v. System Fuels, Inc., 523 So. 2d 983, 992 (Miss. 1988) (grant of entire interest in minerals conveys all incidents of ownership that are not specifically excepted or reserved); *In re* Conservatorship of Stevens v. Patrick, 523 So. 2d 319, 332 (Miss. 1988) (absent other factors, weakness of intellect which does not rise to level of total incapacity is insufficient basis to set aside deed).

[2] *See* R & S Dev., Inc. v. Wilson, 534 So. 2d 1008, 1011 (Miss. 1988) (complete, continuous, and unexplained non-use of public way by general public for period exceeding ten years gives rise to presumption of abandonment by city); Breedon v. Tucker, 533 So. 2d 1108, 1110 (Miss 1988) (to succeed in adverse possession against grantees of remainder of life estate, claimant must be in possession for ten years after expiration of life estate); Aldridge v. Aldridge, 527 So. 2d 96, 100 (Miss. 1988) (notice of lis pendens not filed in lis pendens records will not impute valid legal notice to subsequent purchaser); McNeely v. Jackson, 526 So. 2d 541, 545 (Miss. 1988) (where sporadic use of road with permission of would-be adverse possessors, then domination of road and exclusion of public not complete and continuous enough to constitute abandonment); Welford v. Dickerson, 524 So. 2d 331, 335 (Miss. 1988) (where defendant's actions demonstrate absence of good faith, attorney's fees are recoverable as element of damage in slander of title action); Cheecks v. Herrington, 523 So. 2d 1033, 1036 (Miss. 1988) (latches provides no defense in absence of showing of unequivocal ouster); Merchants Nat'l Bank v. Stewart, 523 So. 2d 961, 965 (Miss. 1988) (doctrine of merger will not constitute grounds for reversal of judgment of civil contempt for failure to abide by court order); Monroe County Bd. of Educ. v. Rye, 521 So. 2d 900, 908 (Miss. 1988) (open, continuous possession of property together with usual acts incident to ownership, is sufficient to raise presumption of previous grant by sovereign).

[3] *See* State Highway Comm'n of Miss. v. Culpepper, 536 So. 2d 18, 19-20 (Miss. 1988) (where trial court unduly restricts discovery so that party cannot fully present case, resulting jury verdict cannot stand); Dykes v. State Highway Comm'n of Miss., 535

So. 2d 1349, 1354 (Miss. 1988) (reversible error for commission counsel to refer to jurors as taxpayers for whom commission works when continued over objections of opposing counsel); Crocker v. Miss. State Highway Comm'n, 534 So. 2d 549, 553-54 (Miss. 1988) (where landowner had introduced evidence of fair market value of property remaining after condemnation under income approach, cost approach, and market data/sales comparison approach, court's refusal to admit evidence under second income approach will not constitute reversible error); State Highway Comm'n of Miss. v. Rankin County Bd. of Educ., 531 So. 2d 612, 614 (Miss. 1988) (maximum fee which may be awarded court appointed appraiser under MISS. CODE ANN. § 11-27-89 (Supp. 1986) cannot exceed $300.00); Miss. State Highway Comm'n v. Viverette, 529 So. 2d 896, 900-01 (Miss. 1988) (trial judge should allow new trial if compensation award is so grossly excessive as to evidence bias, passion, or prejudice, or not based on competent facts).

[4] *See* Miss. State Highway Comm'n v. McClure, 536 So. 2d 895, 896 (Miss. 1988) (commission does not have authority to sell highway right-of-way easement granted for specific highway project); Miss. State Highway Comm'n v. New Albany Gas Station, 534 So. 2d 204, 207 (Miss. 1988) (commission is not estopped through latches to demand removal of gas line attached to bridge for over thirty years and is not required to share in expenses of removal); Gulf Park Water Co. v. First Ocean Springs Dev. Co., 530 So. 2d 1325, 1332 (Miss. 1988) (easement unilaterally planned by grantor at time of transfer and not reserved in deed will not be implied to grantee's property).

[5] *See* Noble v. Scheffler, 529 So. 2d 902, 907 (Miss. 1988) (local zoning authorities must enforce all applicable zoning restrictions unless empowered to grant exception); Luter v. Hammon, 529 So. 2d 625, 628 (Miss. 1988) (if zoning or rezoning decisions are fairly debatable, then courts have no authority to overturn them).

[6] *See* Oktibbeha County Bd. of Educ. v. Town of Sturgis, 531 So. 2d 585, 589 (Miss. 1988) (Miss. Const. section 211 as amended February 4, 1944, is not self-executing and section 16 land leases executed for ninety-nine years prior to the 1946 legislative enactment are void).

[7] *See* Pursue Energy Corp. v. State Oil and Gas Bd., 524 So. 2d 569, 572 (Miss. 1988) (interest expense incurred by operator of drilling unit is not necessary cost of drilling and is not chargeable against the interest of non-consenting owners force-pooled into drilling unit).

[8] *See* R & S Dev., Inc. v. Wilson, 534 So. 2d 1008, 1011 (Miss. 1988) (presumption of abandonment by city of public way where there is complete, continuous, and unexplained non-use by general public); McNeely v. Jacks, 526 So. 2d 541, 545 (Miss. 1988) (claim of abandonment of public road defeated by sporadic use of road way where use is with claimant's permission); Monroe County Bd. of Educ. v. Rye, 521 So. 2d 900, 908 (Miss. 1988) (presumption of grant by sovereign which divest sovereign of title raised by open, continuous possession of property).

[9] *See* Oktibbeha County Bd. of Educ. v. Town of Sturgis, 531 So. 2d 585, 589 (Miss. 1988) (Miss. Const. section 211, as amended February 4, 1944, is not self executing; section 16 leases executed prior to legislative enactment are void); Pursue Energy Corp. v. State Oil and Gas Bd., 524 So. 2d 569, 572 (Miss. 1988) (interest expense incurred by

ions concerning the interpretation of conveyances, an area which was predominant in the Mississippi Supreme Court property decisions for 1988, will also be discussed.[10]

I. MATTERS AFFECTING TITLE

During the 1988 term, the Mississippi Supreme Court addressed issues relating to government title to property. Specifically, the court in *Monroe County Board of Education v. Rye*[11] held that certain fact situations could give rise to a presumption that the state had divested itself of title and perfected title in the occupants of the property.[12] In *Monroe County*, the County Board of Education appealed a Monroe County Chancery Court ruling which cancelled the claims asserted by the Board of Education.[13] Further, the chancellor held good title had vested in the appellees.[14] The property concerned passed by various deeds, leases, and conveyances to the Ryes as three separate parcels.[15]

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operator of drilling unit is not necessary cost of drilling and not chargeable against interest of non-consenting owners).

[10] *See* C & D Inv., Co. v. Gulf Transp. Co., 526 So. 2d 526, 528-29 (Miss. 1988) (wait and see doctrine followed where required contingency for interest to vest actually occurs during perpetuity period); Thornhill v. System Fuels, Inc., 523 So. 2d 983, 992 (Miss. 1988) (grant of entire interest in minerals conveys all incidents of ownership that are not specifically excepted or reserved).

[11] 521 So. 2d 900 (Miss. 1988).

[12] *Monroe County*, 521 So. 2d at 908.

[13] *Id.* at 902. The Board sued to remove clouds and confirm title in the Board of 200 acres of land in Monroe County. *Id.* at 901-02. The opinion is silent as to why or how the Board chose this time to assert title. In fact, it appears that the Ryes as owners in possession had made use of the property for a number of years prior to this action. *Id.* at 902-03.

[14] *Id.* at 902. Though the Ryes were made defendants by their possession of the property, other parties made defendants due to possible interest resulting from being in the various chains of title included the Federal Land Bank of New Orleans, the Southern Royalty Company, Martha Rye Watkins, Winona Rye Freeman, Avonelle Rye Cole, Flora Nell Rye Dobbs, Neal Clement, Howard E. Stover, Estes Peeler Ledbetter, Dick P. Peeler, J. W. Young or his devises or heirs at law, and the Lowndes County Board of Education Trustees. *Id.* at 900-903.

[15] *Id.* at 902-03. The legal description of the concerned property is "[t]he E ½ of the SW ¼, and the SE ¼ of the NW ¼, and the West ½ of the NE ¼ of section 21, Township 15 South, Range 17 West." *Id.* at 902. Between March 7, 1955, when the property was conveyed as a part of a 3,750 acre tract from the Swamp Land Commission of Monroe County to a James A. Sullivan in fee simple, and 1961, when Carl and Gladys Rye received the last of three separate conveyances which constituted the concerned property, said property was subjected to approximately sixteen fee simple conveyances, two tax sales, one executor's sale, three lease arrangements, and three deeds of trust on which the trustee foreclosed and later sold. *Id.* at 902-03. There were two gaps in the

On appeal, the Board of Education presented four issues for argument.[16] The Mississippi Supreme Court affirmed the chancellor's rulings, however the court rejected the chancellor's rationale as a basis for its decision.[17] Instead, the court found persuasive that the facts raised a presumption of a grant from the state at some previous time.[18] The court noted that generally, the presumption of a grant from the sovereign arose only where there exists some prior defect in the chain of title.[19] However, in this instance, the presumption of a grant was sufficiently supported under Mississippi law where there existed open and continuous possession for an extended period of time and combined with other acts normally associated with ownership of the property even absent a defect in the chain of title.[20] In rejecting an argument

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chains of title noted by the court. *Id.* To complicate matters, portions of the property were at times simultaneously subjected to sales, conveyances, and leases. *Id.* The Board of Education's claim of title was based in a conveyance from Sullivan to the Board of Trustees of the Township 15 South, Range 17 West and its successor, which is the Monroe County Board of Education. *Id.* at 902.

[16] *Id.* at 903. The court considered for argument the issues that: (1) the 1867 Monroe County Board of Education as one of the grantees in the multiple chains of title had no authority to acquire real property; (2) the Ryes gained title by adverse possession; (3) the Board of Education, if it ever held title, lost such title by various tax sales; and (4) the Board of Education's claims were barred by the doctrine of latches as the Ryes had been in unchallenged possession for over thirty-five years. *Id.*

[17] *Id.* at 904. The chancellor held the Board of Education was without authority to hold title to the property or, in the alternative, that the Ryes or their predecessors had gained title by adverse possession. *Id.* The court did not fully address the issue of the Board's ability to hold title as trustee, but stated that the trust was valid even if the Board was not a proper trustee. *Id.* at 94 (citing, among others Board of Education of Itawamba County v. Logan, 405 So. 2d 122 (Miss. 1981)).

[18] *Id.* at 904. Specifically, the court found that, as the Ryes and their predecessors in title had paid applicable property taxes during the years in possession, then there was a presumption of a legal liability to pay such taxes, and the liability arose from some grant of title by the sovereign at some past time. *Id.*

[19] *Id.* at 906. Continuous and peaceable possession of property accompanied by the usual acts of ownership will support a claim against the state by a presumption of a grant. *Id.* (citing Caruth v. Gillespie, 109 Miss. 679, 68 So. 927 (1915)). The court reviewed Presley v. Haynes, 182 Miss. 44, 180 So. 71 (1938), in its discussion of the presumption of a grant operating to cure a defect or gap in the chain of title. *Monroe County*, 521 So. 2d at 906-07. *Presley* arose from an indemnity action on a warranty deed initiated when it was discovered that the chain of title was based on a void tax sale. *Presley*, 182 Miss. at 48-9, 180 So. at 71. The *Presley* court found the presumption of a grant from the state absolute where the continuous possession and use was concurrent with the state receiving the taxes on the property as if the property was privately owned. *Presley*, 182 Miss. at 50, 180 So. at 72.

[20] *Monroe County*, 521 So. 2d at 908. The court found guidance in three Arkansas cases; Baker v. Certain Lands in Independence County, 19 Ark. App. 253, 750 S.W. 2d

that the Ryes' possession amounted to adverse possession, the court took great care to distinguish the use of a presumption of a grant as being effective against the state, versus adverse possession which unavailable to divest the state of title to property.[21]

The court addressed a slightly similar issue in *McNeely v. Jacks*,[22] in which the plaintiffs sought a ruling that the defendants had blocked use of a public roadway.[23] From the chancellor's determination that the road in question was a public road which had been abandoned and his ruling dismissing the complaint, the plaintiffs appealed.[24] The Mississippi Supreme Court reversed, holding that the chancellor had erred as a matter of law in holding the road had been abandoned.[25] The court first noted that the concept of a claim by abandonment of a public road way is analogous to the concept of adverse possession against the public as record title holder.[26] Rejecting the arguments of the adverse claimants that their acts denied public access of the roadway to the public, the court found there was not sufficient evidence of non-use by the public to support the abandonment claim by the adverse possessors.[27] Additionally, the court determined that a roadway used by a

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318 (1986), Miller v. Kansas City S. Ry., 216 Ark. 304, 225 S.W. 2d 18 (1949), and Carter v. Stewart, 149 Ark. 189, 231 S.W. 887 (1921). *Monroe County*, 521 So. 2d at 908.

[21] *Monroe County*, 521 So. 2d at 906. The court first noted that the doctrine of presumption of a grant and adverse possession are similar, and that presumption of grant is available only if adverse possession is not a legally viable option to quiet title in the claimant. *Id.* (citing Gibson v. State Land Comm'n, 374 So. 2d 212, 216 (Miss. 1979), and Ittawamba County v. Sheffield, 195 Miss. 359, 13 So. 2d 649 (1943)).

[22] 526 So. 2d 541 (Miss. 1988).

[23] *McNeely*, 526 So. 2d at 542. Plaintiffs were owners of property accessible only by a east-west roadway which years before was a link between two major north-south roads. *Id.* at 542-43. Defendants owned the property located between plaintiff's land and the major road to the west. *Id.* at 543. The defendants had over time fenced their property leaving a gap for the roadway; later the gap was replaced with a gate installed by the plaintiffs. *Id.* The suit was perpetuated by the defendant's removal of the gate, and the installation of permanent fencing across the roadway. *Id.*

[24] *Id.* at 543-44. The court noted that the chancellor's opinion was directed to the arguments of the plaintiffs that the roadway had not been abandoned. *Id.* at 544 n.2. By way of footnote, the court noted that the plaintiff made no claim of right-of-way by prescription, easement, or way of necessity. *Id.*

[25] *Id.* at 545. Based on the record, the court held that at all times the road was a public right of way and had not been abandoned. *Id.*

[26] *Id.* at 544 (citing Roy v. Kayser, 501 So. 2d 1110, 1111 (Miss. 1987), Medina v. State *ex rel.* Summer, 354 So. 2d 779, 783 (Miss. 1977), and Picayune Wood Prod. Co. v. Alexander Mfg. Co., 227 Miss. 593, 86 So. 2d 480, 483 (1956)).

[27] *Id.* The defendants placed importance on the gates and other obstructions across the roadway as demonstrative of denying the public access to the roadway sufficient to constitute abandonment. *Id.* Noting there existed no law on point in Mississippi, the

limited number of people to reach their property, even if not used by the general public, will not support a claim for abandonment.[28]

Finally, the court addressed a similar issue concerning abandonment of property in *R & S Development, Inc. v. Wilson*.[29] In *R & S Development*, plaintiffs sought to enjoin defendant developers from converting an alley behind all the party's properties into a driveway to the developer's property.[30] At trial, the chancellor determined that the alley had been abandoned by the City of Jackson and that title to the alley reverted to the adjoining property owners.[31] The Mississippi Supreme Court held on appeal that the continuous, complete, and unexplained non-use of the alley by the general public for a period exceeding ten years created a presumption of abandonment by the city.[32] Further, the court found that the absence of dominion by the city and

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court found guidance in decisions from Indiana, Nevada, and Alabama. *Id.* (citing Smith v.Smith, 482 So. 2d 1172, 1175 (Ala. 1985) (gate or gap to control live stock does not cause road to lose its character as public way); Fenley Farms, Inc. v. Clark, 404 N.E. 2d 1164, 1170 (Ind. App. 1980) (road not abandoned by attempted obstruction); and Anderson v. Richards, 96 Nev. 318, 608 P.2d 1096, 1099 (1980) (unlawful encroachment on public roadway will not constitute abandonment)). The court found in the record sporadic use by persons other than the plaintiff of the roadway for various business and recreational purposes. *Id.* at 544-45.

[28] *Id.* at 545. The court held as immaterial that the roadway may have only been used by limited persons to gain access to their property as those persons were still members of the public whose use would defeat claims of abandonment or adverse possession. *Id.* The court further noted that the limited use of the roadway, regardless of by whom, appeared from the record to have always been with the defendant's permission. *Id.* Such lack of denial of permission provided further basis against the abandonment claim of the defendants. *Id.*

[29] 534 So. 2d 1008 (Miss. 1988).

[30] *R & S Development*, 534 So. 2d at 1010. The four separate parties involved all owned property adjacent to the alley in question. *Id.* The defendant, R & S Development, owner of one of the properties, began construction of a duplex on the property. *Id.* R & S planned to use the ally for ingress and egress to the duplex property. *Id.* The plaintiffs, owners of the three remaining properties, began this action when R & S hired B & S Services to bulldoze the alley. *Id.* The bulldozing caused damage to the remaining owner's activities which had, over the years, extended into the alley. *Id.*

[31] *Id.* at 1009. The chancellor awarded plaintiffs actual and punitive damages as a result of the bulldozing of the alley. *Id.*

[32] *Id.* at 1010. The court noted the alley had never been used by the City of Jackson for any purpose. *Id.* Further, the record reflected that one plaintiff had extended his garage half way into the alley, another plaintiff had planted dogwoods and azaleas, and another plaintiff had planted ornamental shrubs and trees in the alley. *Id.* at 1010-11. The court cited the previous decision of McNeely v. Jacks, 526 So. 2d 541, 544 (Miss. 1988) to note the trend of Mississippi law provided that protracted non-use of a public right of way for an extended period of time would support common law abandonment of that public way. *R & S Development*, 534 So. 2d at 1011.

the city's acquiescence in the previous modifications to the alley way supported an intent by the city to abandon the alley.[33] The court found that the strong presumption of abandonment in favor of the adjoining property owners was not overcome by the evidence presented by the defendants.[34]

II. STATUTORY INTERPRETATIONS

During 1988, the Mississippi Supreme Court issued two opinions which provided interpretation of two state statutes. In *Pursue Energy Corp. v. State Oil and Gas Board*,[35] the court decided whether interest expense associated with drilling wells could be apportioned among other mineral interest owners.[36] Various oil and mineral interests had previously been force-pooled by the State Oil and Gas Board.[37] Pursue

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[33] *R & S Development*, 534 So. 2d at 1011. The court found persuasive that the city had not used or exercised control over the alley for over 30 years, that the city chose not to defend the city's right to the alley, and that the city had not objected to the plaintiff's previous personal use or construction in the alley way. *Id.* Further, the city engineer had advised R & S Development to obtain the permission of the adjoining land owners before bulldozing in the alley. *Id.*

[34] *Id.* at 1011. As the presumption of abandonment withstood R & S Development's attack, the court upheld the chancellor's ruling that title to the alley reverted to the adjacent property owners who took to the centerline of the alley. *Id.*

[35] 524 So. 2d 569 (Miss. 1988).

[36] *Pursue Energy*, 524 So. 2d at 569.

[37] *Id.* By MISS. CODE ANN. § 53-3-7, multiple leasehold interest in the subject oil field had been force-pooled in response to a petition to the State Oil and Gas Board filed by Pursue Energy Corp. *Pursue Energy*, 524 So. 2d at 569. MISS. CODE ANN. § 53-3-7 states in part,

> (a) when two or more separately owned tracts of land are embraced within an established drilling unit, the person owning the drilling rights therein and the rights to share in the production therefrom may validly agree to integrate their interests and to develop their lands as a drilling unit. Where, however, such persons have not agreed to integrate their interests, the board may, for the prevention of waste or to avoid the drilling of unnecessary wells require such persons to integrate their interests and to develop their lands as a drilling unit. . . .
>
> In the event such pooling is required, *the cost of development and operation of the pooled unit chargeable by the operator to the other interested owner or owners shall be limited to the actual expenditures required for such purpose, not in excess of what are reasonable*, including a reasonable charge for supervision. When production of oil or gas is not secured in paying quantities as a result of such forced unitization, the operator shall have no charge against the nonconsenting owner or owners. *In the event of any dispute relative to, such costs, the board shall determine the proper costs, after due notice to all interested parties and hearing thereon.* Appeals may be taken from such determination as from any other order of the board. (Emphasis added).

Energy, as the designated operator, apportioned interest expense to the non-consenting owners as an actual cost of operation.[38] On appeal, Pursue Energy argued that Mississippi Code Annotated section 53-3-7 (1972) allowed interest expense to be apportioned.[39] The Mississippi Supreme Court, rejecting Pursue Energy's arguments, held that interest expense was not specifically allowed by section 53-3-7 and that the stated interest expense was not a necessary expense of drilling which could be legitimately charged off to the pooled mineral interest owners.[40]

In *Oktibbeha County Board of Education v. Town of Sturgis*,[41] the court addressed the validity of certain sixteenth section land leases. The Board of Education brought action to confirm title and to cancel certain conveyances as clouds on the title.[42] The Town of Sturgis claimed a lease hold interest from a ninety-nine year lease executed in 1945.[43] From a lower court decision confirming the ninety-nine year

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MISS. CODE ANN. § 53-3-7 (1972).

[38] *Pursue Energy*, 524 So. 2d at 569-70. Pursue was allowed by the Board's order, to charge off the interest as a proper cost within the meaning of section 53-3-7. *Id.* at 569.

[39] *Id.* at 570. Pursue argued that all costs which were "reasonable, necessary, and actually incurred" were by statute subject to proration and recoverable from the production attributable to the pooled interest. *Id.*

[40] *Id.* at 571. The court accepted the arguments of the complaining force-pooled non-consenting interest, Shell Western and 3300 Corp. *Id.* The court characterized the question as one of the definition of cost of development. *Id.* The court stated that interest expenses were not included in Miss. Code Ann. § 53-3-7, as the statute allowed only for the recovery of cost of development and operation. *Pursue Energy*, 524 So. 2d at 572. Additionally, the court noted that interest expense was not a necessary cost of business, stating that it was "not physically necessary to borrow money in order to extract minerals." *Id.* at 571.

[41] 531 So. 2d 585 (Miss. 1988).

[42] *Oktibbeha County Bd. of Educ.*, 531 So. 2d at 586. The Oktibbeha Board of Education claimed that the subject property had been improperly leased by the Oktibbeha County Board of Supervisors in 1945 for a ninety-nine year term. *Id.*

[43] *Id.* The Town of Sturgis defended as the successors to the original leaseholder. *Id.* The controversy arose from the execution of a lease after the passage of the February 4, 1944, amendment to Miss. Const. section 211, which then read

> *The Legislature shall enact such laws* as may be necessary to ascertain the true condition of the title to the Sixteenth Section lands in this state, . . ., *and shall* provide that the Sixteenth Section lands reserved for the support of township schools shall not be sold nor shall they be leased for alonger term than ten years for lands situated outside municipalities *and for lands situated within municipalities for a longer term than 99 years, for a gross sum*; provided further than existing leases of the Sixteenth Section lands situated in the municipalities of the state may, for a gross sum, be extended for a term of years not exceeding 99 years from the date of such extension,. . . . (emphasis added).

lease, the Board appealed.[44] The Mississippi Supreme Court reversed, holding that sixteenth section land leases for a ninety-nine year period executed prior to enabling legislation were not valid.[45] The court found that, though such leases were authorized under a Mississippi Constitutional amendment in 1944, the amendment was not self-executing and required legislative action to make possible ninety-nine year leases.[46]

III. Conveyances

The Mississippi Supreme Court addressed the interpretation of a mineral deed in *Thornhill v. System Fuels, Inc.*[47] The subject deed conveyed to Thornhill an undivided one-half interest in any minerals located on the specified property, but excepted the grantee from participating in any present or future lease rentals or bonuses.[48] After wells drilled by System Fuels began producing, Thornhill and those claiming though him filed suit alleging that the deed conveyed a one-half mineral interest subject to the grantor's reserved rights to delay rentals and bonuses.[49] System Fuels answered that the deed conveyed only a non-participating royalty interest, with the grantor reserving the right to delay payments, bonuses from leases, and concurrent right to make leases.[50] The chancellor found for System Fuels, on the basis of *Harris v. Griffith*;[51] Thornhill appealed.[52] The Mississippi Supreme

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Miss. Const. § 211 (amend. 1944). However, the lease was executed prior to the April 10, 1946 change to Miss. Code § 6597 (1942) which provided for such ninety-nine year leases. *Oktibbeha County Bd. of Educ.* 531 So. 2d at 586.

[44] *Oktibbeha County Bd. of Educ.*, 531 So. 2d at 586. The chancellor determined that the constitutional amendment was sufficient to authorize ninety-nine year leases, finding that the amendment was self executing and therefore not requiring a conforming legislative enactment. *Id.* at 587.

[45] *Id.* at 589. The court found that the subject amendment to Miss. Const. § 211 did not confer rights to individuals but only provided for the legislature to pass statutes to effectuate its provisions. *Oktibbeha County Bd. of Educ.*, 531 So. 2d at 588.

[46] *Oktibbeha County Bd. of Educ.*, 531 So. 2d at 588. The court distinguished self-executing amendments to the constitution as ones which by their plain language "grants a distinct right. . . and requires no legislation to effectuate it." *Id.*

[47] 523 So. 2d 983 (Miss. 1988).

[48] *Thornhill*, 523 So. 2d at 984-85. The deed was executed in 1945. *Id.* at 984.

[49] *Id.* at 985. In essence, the Thornhill claim was that the conveyance was one of an undivided one-half interest in the minerals. *Id.* at 992.

[50] *Id.* at 985. The court characterized this claim as one of a non-participating royalty transfer. *Id.* at 992.

[51] 210 So. 2d 629, 635 (Miss. 1968) (reservation of bonuses and rentals along with other terms constitute implied retention of executive rights).

[52] *Thornhill*, 523 So. 2d at 985. The court stated the determining issue to be the character of the conveyance. *Id.*

Court reversed and rendered judgment, holding that the grant of an entire interest in minerals conveys all incidents of ownership thereto that are not specifically excepted or reserved.[53] *Harris v. Griffith* was expressly overruled.[54]

In *C & D Investment Co. v. Gulf Transport Co.*,[55] the Mississippi Supreme Court articulated an exception in the application of the rule of perpetuities. C & D and Gulf Transport entered, as part of a master agreement, a contingent agreement which provided for the possible conveyance of a property from Gulf Transport to C & D.[56] Eleven years later, Gulf Transport conveyed the property, which was the subject of the contingency agreement, to a third party.[57] C & D sought specific performance of the past agreements; however the chancellor dismissed the action pursuant to Mississippi Rules of Civil Procedure 12 (b)(6).[58] The Mississippi Supreme Court, on appeal, reversed and remanded, holding that the wait and see exception to the rule against perpetuities was applicable in Mississippi.[59] The court noted that by the wait and see doctrine, if the required contingency for an interest to vest actually happens during the perpetuities period, then the future interest is held to be valid.[60] The court noted that Mississippi followed the minority of jurisdictions in adhering to the wait and see doctrine.[61]

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[53] *Id.* at 992. The court found that the reservation by the grantor of all rights to bonuses and delay rentals from oil and gas leases did not carry with it by implication any other incidents of ownership. *Id.*

[54] *Id.* The court stated that Harris v. Griffith, 210 So. 2d 629 (1968), which was based on similar facts, erred in concluding that there was a reservation of executive rights where there was a reservation of bonuses and delay rentals. *Thornhill*, 523 So. 2d at 922.

[55] 526 So. 2d 526 (Miss. 1988).

[56] *C & D Inv. Co.*, 526 So. 2d at 527-28. The master agreement provided for the planned use of properties owned between the two parties. *Id.* at 527. The agreement provided that if Gulf Transport conveyed away certain properties, then a twenty-five foot strip of land adjacent to C & D's property would be conveyed to C & D for ingress and egress to C & D's property. *Id.* This agreement was recorded in the land records of the chancery clerk's office. *Id.*

[57] *Id.* at 528. Gulf Transport conveyed property, including the twenty-five foot strip, to its parent corporation by warranty deed. *Id.* By various conveyances, the subject property was finally deeded to a construction company which built their offices on the site. *Id.*

[58] *Id.* at 528. The chancellor found the master agreement uncertain such that a practical remedy could not be supported, the agreement failed to recite adequate consideration, and the agreements did not contain an adequate description of the property to be conveyed. *Id.* Further the chancellor stated that the master agreement violated the rule of perpetuities. *Id.*

[59] *Id.* at 529-30. The court noted a previous decision indicating that Mississippi had adopted the wait and see doctrine. *Id.* at 529.

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[60] *Id.* at 529. The court found that the required contingency, the conveyance of the subject adjacent property, occurred when Gulf Transport conveyed that property to a third party, and therefore the interest of C & D in the twenty-five foot strip had vested. *Id.* at 530.

[61] *Id.* at 529.

TORTS

In 1988, the Mississippi Supreme Court rendered decisions in the area of torts law concerning false imprisonment,[1] strict liability,[2] medical malpractice,[3] negligence,[4] statutes of limitation,[5] actionable words,[6] libel,[7] bad faith,[8] and premises liability.[9] The decisions which had significant impact on the status of Mississippi tort law will be discussed textually.

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[1] Godines v. First Guar. Sav. & Loan Ass'n, 525 So. 2d 1321, 1325 (Miss. 1988) (where there remained factual disputes with regard to whether defendants instigated plaintiff's detention, summary judgment was premature).

[2] Hall v. Miss. Chem. Express, 528 So. 2d 796, 800 (Miss. 1988) (manufacturer was not negligent as matter of law where plaintiff failed to prove that product was not reasonably fit for its intended use or that without additional safety device product was rendered unreasonably dangerous).

[3] Bell v. West Harrison County Dist., 523 So. 2d 796, 800 (Miss. 1988) (failure of nurse to raise rails on patient's bed is medical decision, and two-year medical malpractice statute of limitations applies); Jenkins v. Forrest County Gen. Hosp., 538 So. 2d 1162 (Miss. 1988) (judge should recuse himself where his relative is senior partner in firm representing party to suit and where medical community assisted in electing judge); Walker v. Skiwski, 529 So. 2d 184, 187 (Miss. 1988) (where plaintiff offered no expert testimony concerning competence and skill with which surgical procedure was performed, summary judgment was appropriately entered).

[4] Hood v. Oakley, 519 So. 2d 1236, 1238-39 (Miss. 1988) (admission of evidence of citations given to plaintiff for public drunkenness was not reversible error where there was other testimony pertaining to plaintiff's intoxication and mitigating jury instructions were given); Wood v. Taylor Mach., Inc., 529 So. 2d 606, 610 (Miss. 1988) (under Tennessee law, specific nature of harm to plaintiff need not have been foreseen; it is sufficient if some harm of general type of that which occurred is reasonably foreseeable as result of defendant's failure to exercise due care).

[5] Moore v. Jesco, 531 So. 2d 815, 817 (Miss. 1988) (statute of limitations period for damages from improvements to real property begins to run on written acceptance or actual occupancy, whichever occurred first).

[6] Isaacks v. Reed, 537 So. 2d 409, 410-11 (Miss. 1988) (Actionable Word Statute is applicable only to spoken words).

[7] Johnson v. Delta Democrat Publishing Co., 531 So. 2d 811, 813 (Miss. 1988) (for defamation action to lie, two requirements must be met: "words used must have been clearly directed toward plaintiff and defamation must be clear and unmistakable from words themselves and not product of innuendo, speculation or conjecture"); Blake v. Gannett Co., 529 So. 2d 595, 606 (Miss. 1988) (where plaintiff was private figure, but published statements of which he complained were true or protected opinion or not clearly directed toward plaintiff, action for libel and false light invasion of privacy must fail).

[8] Stamps v. Estate of Watts, 528 So. 2d 812, 814-15 (Miss. 1988) (where insruance company had sought judicial determination by interpleader of division of uninsured motorist proceeds, summary judgment in favor of insurance company on issue of bad faith was appropriate).

I. INTERSPOUSAL IMMUNITY

In *Burns v. Burns*,[10] a divided Mississippi Supreme Court abolished interspousal immunity.[11] Betty Burns sued her husband Erit Lamar Burns to recover for injuries she received from an alleged assault and battery.[12] The trial court, on motion for judgment on the pleadings, dismissed the complaint as barred by the doctrine of interspousal immunity.[13]

The majority based its decision to abolish the common law doctrine on the lack of continued vitality of the reasons traditionally given as justification for the doctrine: (1) The common law concept of unity between husband and wife was said by the majority to be based on the ancient concept of the wife as chattel to her husband; further, it was said to be inconsistent with the Mississippi Constitution.[14] (2) In considering the idea that interspousal immunity promotes domestic tranquility, the majority argued that matrimonial tranquility is destroyed not by the filing of a lawsuit, but by the commission of the tort.[15] (3) The majority likewise dismissed the argument that interspousal immunity acts to discourage fraudulent and collusive claims.[16] The court expressed confidence that the judicial system could ascertain the existence of fraudulent and collusive claims.[17]

Justice Griffin, joined by three other justices, wrote a strong dissent.[18] The dissent argued that if there were a need to change the rule, the legislature should change it, rather than the courts.[19] Other reasons

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[9] Jerry Lee's Grocery v. Thompson, 528 So. 2d 293, 295-96 (Miss. 1988) (overturning jury verdict for plaintiff where there was no evidence that dangerous condition which caused plaintiff's injury was caused by store employees' negligence or that defendant had either actual or constructive knowledge of condition).

[10] 518 So. 2d 1205 (Miss. 1988).

[11] *Burns*, 518 So. 2d at 1211. The court noted that 44 states have either fully or partially abrogated the doctrine. *Id.* at 1208-09.

[12] *Id.* at 1206.

[13] *Id.*

[14] *Id.* at 1209-10. The Mississippi Constitution states, "All courts shall be open; and every person for an injury done him in his . . . person . . . shall have a remedy by due course and right . . . ." MISS. CONST. art. III, § 24.

[15] *Burns*, 518 So. 2d at 1210.

[16] *Id.* at 1210-11.

[17] *Id.* at 1211.

[18] *Id.* at 1213 (Griffin, J., dissenting).

[19] *Id.* (Griffin, J., dissenting).

given for the dissenting justices' belief that the immunity should be continued included public policy related to marriage, the concern that abolition of the immunity would cause a proliferation of fraudulent and collusive actions with consequent overburdening of the court system, and a belief that the divorce courts and criminal courts furnish ample redress to the aggrieved spouse.[20]

II. DAMAGES

In *Whittley v. City of Meridian*,[21] the Mississippi Supreme Court modified the procedure used to determine the damages due to a plaintiff where co-defendants or joint tortfeasors are involved and one of the defendants has settled with the plaintiff.[22] In *Whittley*, the plaintiff, a minor, was rendered a quadriplegic when a refuse bin fell on her.[23] Two defendants settled with the plaintiff for a sum of $2,544,276.[24] In the suit against the city of Meridian, the jury was informed of the settlement.[25] The jury returned a verdict in favor of the city.[26]

Prior case law recognized two acceptable methods for determining damages where one co-defendant had settled with the plaintiff.[27] One method allowed defendant to produce evidence that a settlement had been reached with one or more of the defendants and to inform the jury of the amount of that settlement.[28] The jury, under this procedure, was then instructed that if it returned a verdict for plaintiff, the amount of the award would be reduced by the amount of the previous settlement.[29] Under the second procedure, the jury would not be informed of the amount of the settlement.[30] If the jury's verdict were for the plaintiff, the judge would reduce the amount of the award by the amount of the settlement previously reached with the other defendant or defendants.[31]

In *Whittley*, the petitioner appealed the use of the method whereby the jury was informed of the amount of the settlement.[32] The Mississippi Supreme Court held that the jury may not be informed of the amount of the settlement.[33] If the verdict were for the plaintiff, the judge should reduce the verdict by the amount of the settlement.[34] The court reasoned that a jury would be unnecessarily influenced in its decision if it were informed of the amount of a settlement with a codefendant or a joint tortfeasor.[35] The court also concluded that to inform the jury of the amount of a structured settlement would mislead them because of the need to consider the present cash value of the settlement, rather than the total flow of income over a period for time.[36]

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[20] *Id.* at 1216. (Griffin, J., dissenting).

[21] 530 So. 2d 1341 (Miss. 1988).

[22] *Whittley*, 530 So. 2d at 1346.

[23] *Id.* at 1343.

[24] *Id.* at 1342.

[25] *Id.* at 1345.

[26] *Id.* at 1342.

[27] Garcia v. Coast Elec. Power Ass'n, 493 So. 2d 380, 385 (Miss. 1986).

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* The *Garcia* court indicated a preference for the second procedure, but held that the use of either method would not constitute reversible error. *Id.*

III. EXPERT WITNESSES

At issue in *Miller v. Stiglet, Inc.*[37] was the propriety of expert testimony of police officers and the extent to which an expert in accident reconstruction may be permitted to give his opinion.[38] The litigation in *Miller* grew from an automobile accident, which the plaintiff charged was caused by sand or paint that had been left by Stiglet, Inc. on the bridge where the accident occurred.[39]

At trial, two highway patrol officers were permitted to testify as experts in the field of accident reconstruction.[40] They concluded that the causes of the accident were the slick condition of plaintiff's tires, a wet roadway, and plaintiff's excessive speed.[41]

On appeal, the Mississippi Supreme Court concluded that an officer's expert opinion of the cause of an accident is admissible to the same extent as the opinion of any other accident reconstructionist.[42] The court reasoned that allowing a qualified police officer to testify as an expert was consistent with Rule 702 of the Mississippi Rules of Evidence.[43] The court disagreed with the contention that jurors necessarily give more credence to the testimony of an officer of the law than they would give to the testimony of others.[44] Holding that the trial court properly ruled that the patrolmen's knowledge, skill, experience, training, and education were adequate for them to be qualified as experts, the court stated that the officers' testimony as to the cause of the accident was properly admitted.[45]

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[32] *Whittley*, 530 So. 2d 1345.

[33] *Id.* at 1346.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] 523 So. 2d 55 (Miss. 1988).

[38] *Miller*, 523 So. 2d at 58. The trial was held before the effective date of the new Mississippi Rules of Evidence, but the Mississippi Supreme Court stated that the holding would be the same under the new rules. *Id.*

[39] *Id.* at 56.

[40] *Id.* at 57-58. The first patrolman stated that he had studied accident reconstruction and accident investigation, held a certificate of graduation from the Northwestern Traffic Institute Accident Investigation School, and had investigated between 400 and 600 accidents. *Id.* at 57. The second patrolman had received accident investigation instruction at the Mississippi Highway Patrol Academy and the Northwestern Traffic Institute, as well as from other instructors, and had investigated over a thousand accidents. *Id.*

[41] *Id.* at 57-58.

The court cautioned, however, that "the trial judge, in a case such as this, should determine whether the qualifications as an accident reconstructionist include expertise in retroactively determining speed. An expert witness must be qualified in whatever field of scientific knowledge to which his expert testimony is related."[46] The court concluded that any error in admitting testimony concerning speed was harmless in this case due to the "overwhelming evidence in support of the verdict."[47]

IV. Learned Intermediary Doctrine

In *Wyeth Laboratories, Inc. v. Fortenberry*,[48] the Mississippi Supreme Court adopted the learned intermediary doctrine.[49] The litigation in *Fortenberry* arose after Billy Joe Fortenberry was inoculated with an influenza vaccine.[50] The treating physician testified at trial that he had read the package insert which warned of possible adverse reactions to the vaccine,[51] but that he considered the risks to be remote

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[42] *Id.* at 60.

[43] *Id.* Rule 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Miss. R. Evid. 702.

[44] *Miller*, 523 So. 2d at 59.

[45] *Id.* at 60.

[46] *Id.*

[47] *Id.* In dissent, Justice Hawkins, joined by Justice Griffin, objected that one officer, who had testified to the speed of the car as it went onto the bridge, showed no qualification to enable him to make such a determination. *Id.* at 62 (Hawkins, J., dissenting).

[48] 530 So. 2d 688 (Miss. 1988).

[49] *Fortenberry*, 530 So. 2d at 693.

[50] *Id.* at 689.

[51] *Id.* The court quoted some of the language in the package insert:

> Indications and Usage . . .
>
> Annual routine influenza immunization is NOT recommended for healthy

and refrained from warning his patients because he believed that such a warning would unnecessarily frighten them.[52]

Approximately five days after the inoculation, Fortenberry was stricken with transverse myelitis.[53] There was conflicting testimony at trial as to whether there existed a causal relationship between the administration of the vaccine and Fortenberry's illness.[54]

The jury returned a verdict for the physician and against Wyeth.[55] The Mississippi Supreme Court held that, as a matter of law, Fortenberry failed to prove causation.[56] In doing so, the court adopted the learned intermediary doctrine.[57] This doctrine states that pharmaceutical companies must warn only the prescribing physician of any potential dangers of a prescription drug.[58] The physician then becomes a learned intermediary, who must make an informed medical judgment whether to pass the warning to his patients.[59] The court stated, however, that the pharmaceutical company has a duty to warn the consumer where there is no physician functioning as a learned

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> adults, infants, or children but is strongly recommended for all persons, children and adults, who are at increased risk of adverse consequences from infections of the lower respiratory tract. . . .
>
> ADVERSE REACTIONS . . .
>
> 3. Guillane-Barre syndrome (GBS). This is an uncommon illness characterized by ascending paralysis which is usually self-limiting and reversible. . . . Before 1976, no association of GBS with influenza use was recognized. . . . A statistically significant excess risk of contracting GBS after receipt of the 1978-79 or 1979-80 Influenza Virus Vaccine could not be demonstrated . . . . Nevertheless, candidates for influenza Virus Vaccine should be made aware of the benefits and possible risks, including GBS, of administration.
>
> Other neurologic disorders, including encephalopathies, not defined as GBS, have been temporally associated with influenza vaccination.

Id. at 689 n.1.

[52] *Id.* at 689.

[53] *Id.* Fortenberry's symptoms included impotency, incontinence, and temporary paralysis. *Id.*

[54] *Id.* at 689-90. Wyeth Laboratories, on appeal, questioned the admissibility of the testimony of a biochemist who testified for Fortenberry. *Id.* at 690. The biochemist stated with medical certainty that there was a causal relationship between the symptoms and the vaccine. *Id.* at 689. The Mississippi Supreme Court held that the determination by the trial judge that the biochemist's knowledge and training qualified him as an expert witness was not an abuse of discretion. *Id.* at 690.

[55] *Id.* at 689. The verdict for the physician was not part of this appeal. *Id.* at 693.

[56] *Id.* at 693.

[57] *Id.*

[58] *Id.* at 696.

[59] *Id.* at 691.

intermediary.[60]

On the facts of this case, the court held that the warning furnished by Wyeth on the package insert was adequate as a matter of law,[61] and that the intervening role of the physician as a learned intermediary prevented a finding of liability on the part of the drug manufacturer.[62]

V. Sovereign Immunity

A. *Qualified Public Official Immunity*

In 1988, the Mississippi Supreme Court addressed the confusing issues surrounding sovereign immunity in Mississippi. The first case addressed by the Mississippi Supreme Court was *Marshall v. Chawla*.[63]

In *Marshall*, Wesley Marshall was taken by his wife to the Kuhn Memorial State Hospital emergency room after he became violently ill with a severe headache and vomiting.[64] The emergency room staff called the physician on duty, Dr. Anwant Chawla, and the physician instructed the staff to administer dramamine to the plaintiff.[65] However, the physician did not come to the emergency room to examine Marshall, and Marshall was released soon thereafter without further treatment.[66] Ten hours later the plaintiff suffered a stroke and died.[67]

The plaintiffs then filed suit against the Board of Trustees of the State Eleemosynary Institutions, the hospital supervisors, charging them with the negligence which caused Marshall's death.[68] The trial court nonetheless granted the defendant's motion to dismiss based on the ground of sovereign immunity.[69] The plaintiffs appealed to the

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[60] *Id.* at 692.

[61] *Id.* at 693. Excerpts of the language of the insert are quoted *supra* at note 46. The warning further stated that patients "should be made aware of the benefits and risks, including GBS, of administration." *Id.* at 693.

[62] *Id.*

[63] 520 So. 2d 1374 (Miss. 1988).

[64] *Marshall*, 520 So. 2d at 1374. The plaintiffs were the surviving heirs of the late Wesley Marshall. *Id.*

[65] *Id.*

[66] *Id.* After Marshall was administered dramamine, he was released without further treatment. *Id.*

[67] *Id.* The court in *Marshall* was forced to determine whether under traditional common law principles of sovereign immunity, physicians on staffs of state eleemosynary institutions were immune from all liability for their negligence due to the discretionary character of their duties. *Id.* at 1375, 1377.

[68] *Id.* at 1374-75.

[69] *Id.* at 1375. The hospital supervisors were dismissed on the ground that they were acting in the exercise of duties where discretion and decision-making were required. *Id.*

Mississippi Supreme Court, and the appeal involved only the issue of whether Dr. Chawla was protected from liability by the doctrine of "sovereign immunity" or by the "qualified immunity given to public officials" acting in a discretionary capacity within the scope of their duties.[70]

Before resolving this issue, the court first explained that this case did not involve sovereign immunity at all, since that doctrine applied in a strict sense only to state government and its subdivisions, rather than to their individual employees.[71] However, the court continued by stating that Mississippi public officials enjoyed a qualified immunity for injuries inflicted by them while acting within the scope of their duties,[72] and that Mississippi has applied a distinction between discretionary and ministerial duties of officials when imposing liability.[73] Simply stated, officials were to be protected from suit if acting in a discretionary capacity.[74] A ministerial duty was defined by the court as the following:

> one that has been positively imposed by law and its performance required at a time and manner or upon conditions which

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The trial court then granted Dr. Chawla's motion to dismiss on the basis of sovereign immunity and announced that it was relying upon Hudson v. Rausa, 462 So. 2d 689 (Miss. 1984). *Marshall*, 520 So. 2d at 1375.

[70] *Marshall*, 520 So. 2d at 1375. The plaintiffs appealed only as to Dr. Chawla, and the other defendants were not parties to the appeal. *Id.*

[71] *Id.* The only defendant on appeal was the individual employee, Dr. Chawla, and therefore, the doctrine of qualified public official immunity was in issue, not sovereign immunity. *Id.* However, if this case had involved the state government or its subdivisions, the plaintiff's action would have been governed by traditional common law immunities because the action accrued in 1980. *Id.* The landmark decision of Pruett v. City of Rosedale, 421 So. 2d 1046 (Miss. 1982), abolished sovereign immunity for cases accruing after July 1, 1984, and cases accruing before that date were to be governed by the traditional common law immunities unaffected by *Pruett*. *Marshall*, 520 So. 2d at 1375.

[72] *Marshall*, 520 So. 2d at 1375. Individual employees, such as Dr. Chawla, were found by the court to be protected under the common law public official qualified immunity as opposed to sovereign immunity. *Id.* the court continued in explaining that Mississippi, like many other states, had applied a distinction between the "discretionary" and the "ministerial" duties of public officials. *Id.* However, the court found that only a minority of jurisdictions adhered to Mississippi's approach of absolute immunity from liability for doctors in public service for negligence on account of the discretionary character of their duties. *Id.* at 1376. The court stated that some courts had disposed of this absolute immunity issue in a summary fashion, while others had resolved this issue according to the "Michigan rule that medical decision making was inherently discretionary." *Id.*

[73] *Id.*

[74] *Id.*; *see* Karpors v. Mississippi, 633 F.2d 640, 647 (5th Cir. 1981).

> are specifically designated, the duty to perform under conditions specified not being dependent upon the officer's judgment or discretion, the act being discharged thereof is ministerial.[75]

If the act did not fit this definition, then the court reasoned that it was presumably discretionary, which resulted in a broad application of sovereign immunity.[76] In determining whether Dr. Chawla's act constituted a discretionary act or ministerial act, the court found that in the case of medical doctors in public service, special circumstances were present which rendered a broader grant of immunity to be a sound policy.[77] The court further explained that the failure to provide a qualified immunity from tort liability to government doctors could serve to deter them from entering governmental service.[78] Thus, the court reaffirmed the immunity enjoyed by physicians on the staff of state eleemosynary institutions in affirming the dismissal of Dr. Chawla from the suit.[79]

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[75] *Marshall*, 520 So. 2d at 1375 (citing Poyner v. Gilman, 171 Miss. 859, 864-65, 158 So. 922, 923). The court continued to state that the prevailing test for the classification of ministerial deeds was set forth in Poyner v. Gilmore, 171 Miss. 859, 158 So. 922 (1935). *Marshall*, 520 So. 2d at 1375.

[76] *Marshall*, 520 So. 2d at 1375; *see* Hudson v. Rausa, 462 So. 2d 689, 695-96 (Miss. 1984) (illustrating a brad application of sovereign immunity where physician for State Board of Health was protected by sovereign immunity when he prescribed drug to treat tuberculosis which produced hepatitis as side effect).

[77] *Marshall*, 520 So. 2d at 1375-76. The *Marshall* court recognized that the case of *Hudson v. Rausa* came very close to establishing that "all medical decisions would be immunized from suit if they occurred in the context of a state institution because the administration of medical treatment involves the exercise of considerable professional judgment and its discretion . . .". *Id.* (quoting *Hudson*, 462 So. 2d at 695-96).

[78] *Id.* at 1376. The plaintiffs unsuccessfully argued that *Hudson* was distinguishable from the case at bar by the fact that the physician in *Hudson* was a health department official. *Id.* Alternatively, the court in *Marshall* explained that *Hudson* specifically found that a physician was immunized for particular acts of medical treatment. *Id.* Additionally, the court rejected the plaintiffs' argument that the discretion exercised by a doctor in the normal practice of medicine was not the type which immunized a doctor in public service from personal liability. *Id.* However, the court recognized that most jurisdictions had not squarely confronted the issue of whether a doctor in public service was immunized from all liability for negligence on account of the discretionary nature of his duties. *Id.* The court nonetheless adhered to the view of absolute immunity which constitutes the view of a minority of jurisdictions. *Id.* In justifying its grant of absolute immunity from the liability of negligence on account of the discretionary character of Dr. Chawla's duties, the *Marshall* court explained that the vulnerability of liability would deter doctors from entering government service in the first place. *Id.* at 1377. The protection of qualified immunity thus acted as a strong incentive to encourage doctors to serve in state eleemosynary institutions. *Id.*

[79] *Id.* In dismissing the aciton, the court found *Hudson* controlling. *Id.* The court

B. *Sovereign Immunity as to the State and Political Subdivisions*

The case of *Grantham v. Mississippi Department of Corrections*[80] was decided the same day as *Marshall*, and it also addressed the issue of sovereign immunity.[81] In *Grantham*, the court faced the perils of the defects in our parole system, and the cold reality that the system was immune from suit.[82] The plaintiff[83] in *Grantham* was assaulted, attacked, and almost kidnapped by Clem Jimpson in the parking lot of the bank where she was employed.[84] When the plaintiff screamed for help, she was shot and permanently paralyzed from the neck down as a result.[85] Clem V. Jimpson had been paroled approximately five weeks earlier, after having served twelve years and three months of a life sentence for the murder of a convenience store clerk.[86]

The plaintiff thereafter filed suit against the Mississippi Department of Corrections, and members of the Mississippi Parole Board, in their individual and official capacities, and the former Commissioner of the Mississippi Department of Corrections, in his individual and for-

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noted that the legislature could have implicitly created state tort liability by prescribing specific duties of individual state employees. *Id.* However, no such statute was found to exist for state medical employees. *Id.* (citing Grantham v. Mississippi Dept. of Corrections, 522 So. 2d 219 (1988)).

[80] 522 So. 2d 219 (Miss. 1988).

[81] *Grantham*, 522 So. 2d at 219. *Grantham* addressed whether sovereign immunity extended to the Mississippi Parole Board and to the Department of Corrections. *Id.* The court additionally faced the doctrine of qualified public official immunity in its application to Parole Board members and to the Commissioner of the Mississippi Department of Corrections. *Id.*

[82] *Id.* at 223-26. The court determined that the Parole Board, Department of Corrections, and Commissioner of Corrections were immune from suit, even though the allegations against the Parole Board members were found to be sufficient to pierce the shield of their qualified immunity to suit. *Id.* at 226.

[83] *Id.* at 220. The plaintiff was Linda Grantham. *Id.* On February 12, 1985, Linda Grantham was returning from lunch to her job as Assistant Vice President of Deposit Guaranty National Bank in Jackson when the incident which gave rise to his case occurred. *Id.*

[84] *Id.* The plaintiff was approached by Clem Jimpson in the parking lot of the Raymond-Terry Road Branch Bank. *Id.*

[85] *Id.* at 221. The court noted that Grantham had instituted an action against Jimpson in tort, but also recognized that the action was of little value due to Jimpson's economic status. *Id.*

[86] *Id.* at 221. The plaintiff alleged in an amended complaint that Jimpson and seventy-two other inmates were approved for parole and released the same day. *Id.* The plaintiff further alleged that the defendants had approved Jimpson's release without reviewing all of the pertinent information as required by § 47-7-17 of the Mississippi Code (1972). *Id.* at 221.

mer official capacity.[87] The plaintiff alleged that by paroling and releasing Jimpson, the defendants acted arbitrarily, negligently, and with reckless disregard for the safety of society in general, and herself in particular.[88] However, the circuit court dismissed her complaint on immunity grounds, and the plaintiff then appealed to the Mississippi Supreme Court.[89]

On appeal, the Mississippi Supreme Court explained that the plaintiff's complaint was to be tested, via motion to dismiss for failure to state a claim, substantially by reference to Rules 8(a) and (e) of the Mississippi Rules of Civil Procedure.[90] Thus, in order to dismiss for failure to state a claim, the court was required to determine with reasonable certainty that there was no set of facts consistent with the allegations in the complaint upon which the plaintiff would be entitled to any relief against any defendant.[91]

The court therefore had to consider the issue of sovereign immunity against each defendant separately.[92] The court first considered the plaintiff's claims against the Parole Board and the Department of Corrections as legal creatures and entities of the State of Mississippi.[93] In an effort to clarify the confusing statutes of sovereign immunity in Mississippi, the court explained that the "judicially" created doctrine of sovereign immunity was abolished by the Mississippi Supreme Court in *Pruett v. City of Rosedale*.[94] In that decision, the court set July 1, 1984, as the effective date for the recognition of state tort liability.[95] The court continued in explaining that in 1984, the legislature enacted a stature waving the sovereign immunity of the state and its political subdivisions.[96] However, the act provided that it was to apply only to claims which occurred on or after July 1, 1985, as to the state, and on or after October 1, 1985, as to political subdivisions.[97] Additionally, the act provided that claims that accrued prior to July 1985, as to the state or, prior to October 1, 1985, as to political subdivisions, were not to be affected by this act, but rather were to be controlled by case law governing sovereign immunity as it existed immediately prior to *Pruett v. City of Rosedale* and by the statutory law governing sovereign immunity existing prior to July 1, 985.[98]

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[87] *Id.*

[88] *Id.* at 222. The plaintiff also alleged that the Parole Board and its members were grossly negligent because less than five minutes was spent in considering Jimpson's parole. *Id.*

[89] *Id.* at 221. The plaintiff's complaint was dismissed without the benefit of even pretrial discovery. *Id.*

[90] *Id.* In explaining the procedure posture of this case, the court recognized that Rule 8(a) and (e) of the Mississippi Rules of Civil Procedure displaced any notion of fact pleading in requiring only a short and plain statement of the claim showing that the pleader was entitled to relief. *Id.*

[91] *Id.* The court continued to explain the procedural posture of the *Grantham* case in stating that a motion to dismiss under Rule 12(b) (6) of Mississippi Rules of Civil Procedure was not to be granted unless it appeared beyond a doubt that the plaintiff could prove no set of facts in support of her claim entitling her to relief. *Id.*

[92] *Id.* at 222. The court had to consider the plaintiff's claim against each defendant, or group of defendants, in order to determine whether with reasonable certainty that there were no set of facts entitling the plaintiff to relief against any defendant. *Id.*

[93] *Id.* Sovereign immunity, no qualified public official immunity, was applicable to the Parole Board and the Department of Corrections as they constitute state entities. *Id.*

[94] 421 So. 2d 1046 (Miss. 1982).

Therefore, the court determined that the issues of liability against the Parole Board and the Mississippi Department of Corrections[99] was controlled by pre-*Pruett* case law because Jimpson was paroled January 9, 1985, and the shooting occurred on February 12, 1985.[100] Hence, both the Parole Board and the Mississippi Department of Corrections were immune from suit for the January/February 1985 tort arising from the performance of governmental functions.[101]

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[95] *Grantham*, 522 So. 2d at 222. The Mississippi Supreme Court abolished the judicially created sovereign immunity in *Pruett*, but the holding of Pruett has never come into effect. *Id.* at fn. 1; *see* MISS. CODE ANN. § 11-46-6 (Supp. 1987) (presently providing that waiver shall apply to claims arising after July 1, 1988, as to the state, and on or after October 1, 1988, as to political subdivisions).

[96] *Grantham*, 522 So. 2d at 223. In response to *Pruett*, the court explained that the legislature enacted a statute that waived the sovereign immunity of the state and political subdivisions, but the act was limited as to when it was to come into effect. *Id.*; *see* Laws, 1984, Ch. 495 (codified at MISS. CODE ANN. § 11-46-1, et seq.). The act specifically provided that waiver was only to apply to claims that accrued on or after July 1, 1985, as to the state, and on or after October 1, 1985, as to political subdivisions. *Grantham*, 522 So. 2d at 222. The court further explained that the act provided that claims that accrued prior to July 1, 1985, as to the state or, prior to October 1, 1985, as to political subdivisions were to be governed by pre-*Pruett* case law and by statutory law governed by pre-*Pruett* case law and by statutory law governing sovereign immunity prior to July 1, 1985. *Id.* Furthermore, the court determined that the legislature has yearly re-enacted the statute governing the claims to which waiver was to apply and had extended the date to 1988. *Id.* at n.1; *see* MISS. CODE ANN. § 11-46-6 (Supp. 1987) (waiver now only applicable to claims arising after July 1, 1988, as to state, and on or after October 1, 1988, as to political subdivision).

[97] *Grantham*, 522 So. 2d at 222. Since legislature has re-enacted the statue and extended the date for the abolition of sovereign immunity, the holding of *Pruett* has never come into effect, nor has the waiver of the act. *Id.*

[98] *Id.*

[99] *Id.* at 222-23. The liability of the Parole Board and the Mississippi Department of Corrections was considered separately from the liability of the Commissioner and the liability of the individual members of the parole board. *Id.* Separate consideration is required because the latter involved qualified public official immunity, not sovereign immunity. *Id.* at 223.

[100] *Id.* at 223. The court determined that the circuit court had erroneously decided that the Parole Board was immune on the basis of "governmental entity" immunity for

The court next considered the issue of liability against Commissioner Thigpen and the members of the Parole Board.[102] The court began its analysis by recognizing that Mississippi law afforded prison officials a qualified immunity under the ministerial/discretionary dichotomy against civil actions and claims of damage caused by acts or omissions within the performance of their "official" responsibilities.[103]

Hence, the Mississippi Supreme Court affirmed the dismissal of Commissioner Thigpen on the basis that there was nothing to suggest that the plaintiff could have been able to prove that he had committed any intentional tort or had acted substantially at a variance with his authority.[104] Alternatively, the court reversed the dismissal of the members of the Parole Board from the suit, and the court explained that the plaintiff's complaint had charged the Parole Board members

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discretionary functions as provided for in § 11-46-9 (c) of the Mississippi Code. *Grantham*, 522 So. 2d at 223, n.2. The Mississippi Supreme Court explained that the circuit court had erred because that statute was only effective against claims that arose after the time at which the claim in the instant case arose. *Id.* The court continued in its explanation in stating that the discretionary/ministerial doctrine was applicable only to suits against officials, not to suits against the agencies or departments in which they serve. *Id.* Thus, the court found that the statutes governing the Parole Board, probation, and parole decisions were located at MISS. CODE ANN. § 47-7-1, *et seq. Grantham*, 522 So. 2d at 233. The court furthermore determined that these statutes contained no provisions for waiver. *Id.* However, MISS. CODE ANN. § 47-5-1, et seq., which created and controlled the Mississippi Department of Corrections, authorized the acquisition of liability insurance. *Grantham*, 522 So. 2d at 223. The statute allowed the Board, the Commissioner, and regular employees of the correction system to be sued up to the limit of the liability insurance, but the court found the plaintiff had failed to allege that Board in fact had acquired any such liability insurance. *Id.*

[101] *Grantham*, 522 So. 2d at 223.

[102] *Id.* The court reviewed the basis of qualified public official immunity and found that it was necessary evil to provide our poorly paid and overburdened correctional and parole officials a qualified immunity. *Id.*

[103] *Id.* at 225. In addressing the qualified public official immunity of Commissioner Thigpen, the Court found that Mississippi law allowed a governmental official no immunity to a civil action for damages if the breach of such official's legal duty caused injury and if the duty breached constituted a "ministerial." *Id.* Furthermore, the court continued to state that neither was immunity afforded if the duty breaches involved the use of discretion and the governmental actor greatly or substantially exceeded his authority and in the course thereof caused harm, just as no immunity as to be granted to a governmental actor who committed an intentional tort. *Id.*

[104] *Id.*

with gross neglect of their duties.[105] In rejecting the argument that the Parole Board's duties were to be classified as "ministerial," the court found that the alleged gross neglect seemed sufficient to pierce the shield of the Parole Board's qualified immunity.[106]

VI. Liability Insurance and Waiver of Sovereign Immunity

A different aspect of sovereign immunity was addressed by the Mississippi Supreme Court in *Strait v. Pat Harrison Waterway District*.[107] In *Strait*, the court was faced with the task of determining whether a statutory grant of authority to purchase liability insurance waived the sovereign immunity of Pat Harrison Waterway District, a state agency.[108] The issue in this case arose out of an ankle injury which Richard Kim Strait sustained on July 4, 1984, while riding a waterslide.[109] The plaintiff Strait filed suit against Pat Harrison Waterway District due to its role in designing and construction the waterslide amusement park facility at which the injury occurred.[110] Since the trial court granted the defendant's motion for summary judgment on the grounds of the sovereign immunity bar, Strait appealed.[111]

On appeal, the Mississippi Supreme Court first determined whether the legislature had waived the sovereign immunity of Pat Harrison Waterway District to the extent of the amount of the general liability insurance purchased by the district which constituted the sum of $2,500,000.[112] The court once again explained that *Pruett v. City of Rosedale*[113] had abolished the doctrine of sovereign immunity prospectively from July 1, 1984, but that the legislature in a negative response to *Pruett* had enacted the Sovereign Immunity Act of 1984.[114] The court further explained that the Sovereign Immunity Act of 1984 as amended extended the prospective date for the abolition of sovereign immunity to July 1, 1988, for the State of Mississippi, and October 1, 1988, for its political subdivisions.[115] Significantly, the act specifically provided that claims against the State or its subdivisions which arose before the 1988 abolition dates were to be governed by pre-*Pruett* case law and statutory law governing sovereign immunity in effect from and after the passage of Chapter 474, Laws of 1985.[116]

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[105] *Id.* at 226. The court found that the plaintiff had charged the members of the parole board with reckless disregard, and that the members had departed substantially from their statutory duties. *Id.* Hence, the court found that the complaint had stated a claim upon which relief could be granted, but the court stated that it was in no way intimating that the plaintiff should recover. *Id.* Rather, the case was to be remanded to the circuit court to proceed against the members of the parole board as if the motion to dismiss had been denied. *Id.*

[106] *Id.*

[107] 523 So. 2d 36 (Miss. 1988).

[108] *Strait*, 523 So. 2d at 36. Richard Kim Strait appealed from a summary judgment entered against him and in favor of Pat Harrison Waterway District int he Circuit Court of Lauderdale County. *Id.* at 37. Pat Harrison Waterway District was found by the court of constitute a state agency which was charged with the construction of reservoirs, water supplies, and recreational facilities throughout a fifteen-county area in Mississippi. *Id.* (citing MISS. CODE ANN. § 51-15-101, et seq. (1972)). The complaint sought damages for personal injuries sustained by Strait at a waterside amusement park which was operated by Pat Harrison Waterway District. *Id.*

[109] *Id.* at 37. Strait, his wife, and their two children went to "Okatibbee Splash Down Country," a waterside amusement park, on July 4, 1984. *Id.* While at the amusement park, the family took several rides on three waterslides, and Strait severally injured his left ankle on one of the sides. *Id.*

[110] *Id.* The plaintiff sought $462,226.12 in damages for the personal injuries he sustained on the waterside. *Id.*

[111] *Id.*

Hence, the court then reasoned that since the plaintiff's claim arose on July 4, 1984, then it was controlled by pre-*Pruett* case law and the Sovereign Immunity Act, as amended.[117] Consequentially, under this law, the State and its subdivisions were not subject to suit in the absence of express statutory authority, and the court explained that this express statutory authority was not to be implied unless the implication was made clear and unambiguous by the enabling statute.[118]

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[112] *Id.* Furthermore, the statutory authorization for the acquisition of liability insurance provided the following:

> In addition to the acts authorized by Section 51-15-119, the Pat Harrison Waterway District, through its board of directors, is hereby empowered, in its discretion, to purchase comprehensive general liability insurance in such amount or limit as the board of directors may deem advisable in order to protect and indemnify said district against damages resulting from an accident. Premiums accruing on insurance purchased under the provisions of this section shall be paid from the general fund of the district. This section shall stand repealed form and after October 1, 1988.

Miss. Code Ann. § 51-15-120 (Supp. 1987). Hence, pursuant to this statutory authority, Pat Harrison Waterway District obtained two liability insurance policies. *Strait*, 523 So. 2d at 38.

[113] 421 So. 2d 1046 (Miss. 1982).

[114] *Strait*, 523 So. 2d at 38; *see* Miss. Code Ann. § 11-46-1, et seq. (Supp. 1987) (Sovereign Immunity Act of 1984 as amended has extended prospective date for abolition of sovereign immunity to July 1, 1988, for state, and October 1, 1988, for political subdivisions which arose before the 1988 abolition dates to be governed by pre-*Pruett* case law and by statutory law in effect from the after the passage of Chapter 474, Laws of 1985. *Strait*, 523 So. 2d at 38.

[115] *Strait*, 523 so. 2d at 38. The court determined that Chapter 474, Laws of 1985, constituted the present version of the Sovereign Immunity Act. *Id.* at 38, n.1. The court continued in stating that Chapter 474, Laws of 1985, together with minor amendments provided by Chapter 438, Laws of 1986, and Chapter 483, Laws of 1987, were now codified at Miss. Code Ann. § 11-46-1, *et seq.* (Supp. 1987). *Strait*, 523 So. 2d at 38, n.1.

[116] *Strait*, 523 So. 2d at 38, n.1; *see* Miss. Code Ann. § 11-46-6 (Supp. 1987) (present version of Sovereign Immunity Act).

[117] *Strait*, 523 So. 2d at 38.

However, statutory construction problems arose concerning whether sovereign immunity had been waived from the mere statutory authorization to purchase liability insurance.[119] The court found that Pat Harrison Waterway District had in fact obtained two liability insurance policies, and these policies were in force at the time of the plaintiff's injury in 1984.[120] The issue of statutory interpretation that the court faced in this case concerned the fact that the previous cases which addressed this issue had come before the court at a time when there was no statutory authority for the governmental entities' purchase of insurance,[121] and additionally that the present statute which authorized this purchase of liability insurance was silent as to its effect on immunity.[122]

In resolving this statutory interpretation, the court explained that at least twenty-nine varieties of state subdivisions were authorized by statutes could generally be categorized into three groups: (1) those which expressly state that the subdivision was still protected by sovereign immunity notwithstanding the authority to purchase insurance;[123] (2) those which expressly stated that sovereign immunity was waived to the extent of the insurance coverage purchased;[124] and (3) those which were silent as to the effect, if any, on sovereign immunity.[125]

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[118] *Id.*

[119] *Id.*; *see* MISS. CODE ANN. § 51-15-120 (Supp. 1987) (statutory authorization for the purchase of liability insurance).

[120] *Strait*, 523 So. 2d at 38. Pat Harrison Waterway District had obtained two policies which totaled $2,500,000 in liability coverage. *Id.* Strait contended that the statutory authorization for the purchase of liability insurance impliedly waived sovereign immunity to the extent of the insurance purchased. *Id.*

[121] *Id.*; *see* Prench v. Pearl River Valley Water Supply Dist., 394 So. 2d 1385, (Miss. 1981) (finding that mere purchase of liability insurance by governmental entity had not waived sovereign immunity, but there was not statutory authority for purchase of liability insurance at that time); Joseph v. Tenn. Partners, Inc., 501 So. 2d 371, (Miss. 1987) (finding no waiver of sovereign immunity due to purchase of liability insurance without express statutory authority).

[122] *Strait*, 523 So. 2d at 41; *see* MISS. CODE ANN. § 51-15-120 (Supp. 1987) (statutory authority for purchase of liability insurance by Pat Harrison Waterway District).

[123] *Strait*, 523 So. 2d at 41; *see* MISS. CODE ANN. § 55-9-89 (Supp. 1987) (expressly reserved sovereign immunity of County Park Commissioner); MISS. CODE ANN. § 65-1-8 ¶ (Supp. 1987) (expressly reserving sovereign immunity of Highway Department).

[124] *Strait*, 523 So. 2d at 41; *see* MISS. CODE ANN. § 19-5-99 (Supp. 1987) (sovereign immunity expressly waived to extent of insurance purchased for Economic Development District); MISS. CODE ANN. § 19-7-8 (Supp. 1987) (sovereign immunity expressly waived

The court then reasoned that the omission of language waiving sovereign immunity indicated that the legislature had not intended the waiver to apply, and furthermore that the statute in question was both unclear and ambiguous with respect to sovereign immunity due to the

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to extent of insurance purchased for Counties); MISS. CODE ANN. § 21-15-6 (Supp. 1987) (sovereign immunity expressly waived to extent of insurance purchases for municipalities); MISS. CODE ANN. § 33-7-304 (Supp. 1987) (expressly waiving sovereign immunity to extent of insurance purchases for school districts); MISS. CODE ANN. § 37-29-83 (Supp. 1987) (expressly waiving sovereign immunity to extent to insurance purchased for junior colleges); MISS. CODE ANN. § 37-29-85 (Supp. 1987) (expressly waiving sovereign immunity to extent of insurance purchased for junior college boards); MISS. CODE ANN. § 41-13-11 (Supp. 1987) (expressly waiving sovereign immunity to extent of insurance purchases for community hospitals); MISS. CODE ANN. § 41-29-108 (Supp. 1987) (expressly waiving sovereign immunity to extent of insurance purchased for Bureau of Narcotics); MISS. CODE ANN. § 41-55-5 (Supp. 1987) (expressly waiving sovereign immunity to extent of insurance purchases for County Public Ambulance Service); MISS. CODE ANN. § 41-61-63 (Supp. 1987) (expressly waiving sovereign immunity to extent of insurance purchases for State Medical Examiner); MISS. CODE ANN. § 43-27-10 (Supp. 1987) (expressly waiving sovereign immunity to extent of insurance purchases for Department of Youth Services); MISS. CODE ANN. § 45-5-75 (Supp. 1987) (expressly waiving sovereign immunity to extent of insurance purchases for Board of Corrections); MISS. CODE ANN. §57-32-5 (Supp. 1987) (expressly waiving sovereign immunity to extent of insurance purchases for Southwest Mississippi Industrial Council); MISS. CODE ANN. § 59-17-31 (Supp. 1987) (expressly waiving sovereign immunity to extent of insurance purchases for State Inland Port Authority); MISS. CODE ANN. § 61-3-15 (Supp. 1987) (expressly waiving sovereign immunity to extent of insurance purchases for airport authorities).

[125] *Strait*, 523 So. 2d at 42; *see* MISS. CODE ANN. § 21-27-17 (Supp. 1987) (silent as to effect of acquisition of insurance on sovereign immunity with respect to Municipal Public Utility Commissions); MISS. CODE ANN. § 21-37-37 (Supp. 1987) (silent as to effect of acquisition of insurance on sovereign immunity with respect to Municipal Park Commissions); MISS. CODE ANN. § 41-19-33 (Supp. 1987) (silent as to effect of acquisition of insurance on sovereign immunity with respect to Regional Mental Retardation Commissions); MISS. CODE ANN. § 45-1-19 (Supp. 1987) (silent as to effect of acquisition of insurance on sovereign immunity with respect to Department of Public Safety); MISS. CODE ANN. § 49-1-60 (Supp. 1987) (silent as to effect of acquisition of insurance on sovereign immunity with respect to Department of Wildlife Conservation); MISS. CODE ANN. § 51-15-120 (Supp. 1987) (silent as to effect of acquisition of insurance on sovereign immunity with respect to Pat Harrison Waterway District); MISS. CODE ANN. § 57-13-5 (Supp. 1987) (silent as to effect of acquisition of insurance on sovereign immunity with respect to Research and Development Center); MISS. CODE ANN. § 51-13-13 (Supp. 1987) (silent as to effect of acquisition of insurance on sovereign immunity with respect to State Military Department); MISS. CODE ANN. § 73-31-7 (Supp. 1987) (silent as to effect of acquisition of insurance on sovereign immunity with respect to State Board of Psychological Examiners); MISS. CODE ANN. § 77-5-725 (Supp. 1987) (silent as to effect of acquisition of insurance on sovereign immunity with respect to Municipal Utility Commission Joint Agencies).

absence of an express waiver provision.[126] The court then reasoned that since a waiver of sovereign immunity was to be implied only where the statute was clear and unambiguous, then the statutory grant of authority to purchase liability insurance had not waived Pat Harrison Waterway District's sovereign immunity.[127] Therefore, the court found that the action was banned by the doctrine of sovereign immunity and affirmed the judgment of the circuit court.[128]

The court once again addressed sovereign and public official sovereign immunity and the implication of the acquisition of liability insurance in *Region VII Mental Health v. Isaacs*.[129] In *Isaacs*, the family of John Isaacs instituted a wrongful death action for the death of Isaacs who was stabbed by his roommate in the Supervised Apartment Program established by Region VII.[130] The defendants named in the action were Region VII, its individual commissioners, and an employee of Region VII in the Supervised Apartment Program.[131] The complaint alleged that the defendants owed a duty of reasonable care with regard to the protection of John Isaacs and further that this duty had been negligently breached in the course and scope of the defendant's employment rendering them jointly and severally liable for damages for the wrongful death of John Isaacs.[132] The circuit court denied the defendants' motion for summary judgment which was based upon the defense of sovereign immunity and qualified public official immunity, and the defendants' motion for interlocutory appeal was thereafter granted to address the denial of the motions for summary judgment.[133]

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[126] *Strait*, 523 So. 2d at 39-40. The court concluded that the legislature had expressed a policy regarding the shown subject of sovereign immunity in the Sovereign Immunity Act of 1984. *Id.* at 40. The court found that the policy expressed in the Sovereign Immunity Act of 1984 was to remain in force until 1988. *Id.* Therefore, the court was required to construe all the statutes enacted on sovereign immunity together in order to determine the legislative intent on the whole subject. *Id.*

[127] *Id.*

[128] *Id.* at 41. The court also rejected the proposition that the Pat Harrison Waterway District was engaged in a proprietary enterprise and thus was removed from the protection of sovereign immunity. *Id.* at 40. The court explained that the "proprietary/governmental" test for waiver of immunity applied only to municipalities. *Id.* The court continued to state that the test for waiver of sovereign immunity of a municipality was different in origin and in scope from the sovereign or governmental immunity of the state. *Id.*

Finally, the court rejected the plaintiff's third proposition which asserted that since the defendant district had entered into a business relationship which was contractual in nature, then the defendant district had waived sovereign immunity. *Id.* The court did recognize that when the legislature authorized the state's entry into a contract, the state consequentially waived its immunity from suit for breach of that contract, but the court found that the suit had proceeded solely on a negligence theory and the duty owed to a business invitee. *Id.* at 41. Therefore, the court found this third proposition to be without merit. *Id.*

[129] 523 So. 2d 1013 (Miss. 1988).

[130] *Isaacs*, 523 So. 2d at 1013. The plaintiffs sought to recover $1,000,000 actual and $1,000,000 punitive damages for the wrongful death of John Isaac. *Id.* The facts reveal that John Isaacs and James Bishop were roommates in the Supervised Apartment Program established by the Region VII Mental-Health Retardation Commission. *Id.* The Supervised Apartment Program provided commercially available units for lease to certain disabled adults enrolled in the program. *Id.*

[131] *Id.* at 1014. The duties of the Region VII commissioners were found by the court to be enumerated under § 41-19-33 of the Mississippi Code Annotated. *Id.* at 1016. The

On appeal, the Mississippi Supreme Court first found that this controversy was controlled by pre-*Pruett* case law and statutory law in effect prior to July 1, 1984, since Isaacs' claim arose on March 5, 1981.[134] Then the court addressed the statutory authorization for the acquisition of liability insurance.[135] Following the reasoning of *Strait v. Pat Harrison Waterway District*[136] the court found that the mere acquisition of liability insurance by a governmental entity did not waive sovereign immunity.[137] Therefore, the court found that the motion for summary judgment made by defendant Region VII was improperly denied as there was no express statutory waiver.[138]

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duties consist of the following: administration of programs; the establishing, owning, and leasing of mental health facilities; the entering into contracts with state and federal governments, and their agencies; the employment of personnel in the mental health facilities; and the promotion of the general mental health of the people of the region. *Id.* at 1016 (citing Miss. Code Ann. § 41-19-33 (f) (1972)). The employee of Region VII, George Renaker, was charged with negligent supervision. *Id.* at 1017. Renaker was first employed in 1981, and he held the position of "Community Living Coordinator" for the supervised apartment program. *Id.* He was able to have daily contact with each resident in the program since pursuant to his capacity as Community Living coordinator, he lived at the apartments. *Id.* Renaker's responsibilities encompassed supervision of the clients with respect to their jobs and daily activities. *Id.*

[132] *Id.*

[133] *Id.* at 1015.

[134] *Id.* The court determined that under pre-*Pruett* case law and statutory law in effect prior to July 1, 1984, the state and its subdivisions were not subject to suit in absence of express statutory authority. *Id.* The court continued in stating that express statutory authority was not to be merely implied unless the implication was clear and unambiguous. *Id.*

[135] *Id.*

[136] 523 So. 2d 36 (Miss. 1988).

[137] *Isaacs*, 523 So. 2d at 1015. After determining that the acquisition of liability insurance was provided for under the enabling statute authorizing regional commissions as Region VII, the court concluded that there was by no means any indication of an explicit waiver as required by Mississippi case law. *Id.*

[138] *Id.* at 1016, 1018. The court furthermore found that the Region VII commissioners were entitled to "public official immunity" in that they had acted in a purely discre-

VII. JUDICIALLY CREATED SOVEREIGN IMMUNITY VERSUS THE LEGISLATIVE DOCTRINE OF SOVEREIGN IMMUNITY

In *Webb v. Lincoln County*,[139] the Mississippi Supreme Court clearly explained that the holding of *Pruett v. City of Rosedale*,[140] which abolished the judicially created sovereign immunity, had never come into effect.[141] The court recognized that the court had previously set July 1, 984, as the effective date for the recognition of state tort liability, but that since 1984, the legislature had repeatedly enacted a legislative doctrine of sovereign immunity, with each set to repeal at the end of the fiscal year following the legislative session during which it was enacted.[142]

The dispute in *Webb* arose in 1986 when the vehicle in which the Webbs were riding proceeded through an unmarked "T" intersection and struck a tree.[143] The Webbs thereafter filed suit against the Mississippi State Highway Department, in its official capacity, and Lincoln County and its five supervisors in their individual and official capacities.[144] The complaint alleged that the defendants had failed to prop-

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tionary manner as opposed to ministerial. *Id.* at 1016-17. The court reasoned that the commissioners' acts constituted purely discretionary decisions made by the board as a whole regarding program establishment and implementation, and consequentially their motions for summary judgment were improperly denied. *Id.* at 1017.

Then, in analyzing the application of the qualified immunity normally granted to public officials as extending to the Region VII employee, the court relied on the principals established in *Marshall v. Chawla*. *Id.* at 1017. The court reasoned that *Marshall v. Chawla* allowed qualified public official immunity to extend to the defendant employee in that qualified public official immunity applied not only to decisions with instituting a program for control, but also to the treatment administered in carrying out such policies. *Id.* at 1017-18. The court thus concluded that qualified public official immunity extended to the defendant employee just as it extended to Dr. Chawla in *Marshall v. Chawla*. *Id.* at 1018.

[139] 536 So. 2d 1356 (Miss. 1988).

[140] 421 So. 2d 1046 (Miss. 1982).

[141] *Webb*, 530 So. 2d at 1358.

[142] *Id.*

[143] *Id.* Christopher Robert Webb, his wife, and their young son, were traveling in Lincoln County, Mississippi, on a rainy and foggy night when the accident occurred. *Id.* The Webbs were traveling down "Robert Adams Road" when the road suddenly came to an end without any warning. *Id.* The accident inflicted serious injuries on Mrs. Webb which consisted of a broken nose, broken maxilla, broken shoulder, broken ankle, and broken facial bones. *Id.* The Webbs alleged that the intersection had previously been marked by a stop sign, and that the failure to supervise and safely maintain the intersection had caused the injuries. *Id.*

[144] *Id.* The Mississippi State Highway Commission and its director, John R. Tabb, denied any obligation to maintain the intersection at which the accident occurred. *Id.* On appeal, the Mississippi Supreme Court agreed, and the court explained that unless cer-

erly supervise or maintain the intersection in a reasonably safe manner, and that the defendants had failed to warn of the condition existing at the intersection, and finally that the defendants failed to properly maintain the intersection according to the uniform traffic control device manual.[145] The circuit court granted the defendants' motion to dismiss.[146]

On appeal, the Mississippi Supreme Court initially determined that the Webbs' claim was controlled by pre-*Pruett* case law and statutory law even though the claim arose in 1986.[147] In explaining the ambiguities between the judicially created sovereign immunity and the legislatively created sovereign immunity, the court relied on the case of *Grantham v. Department of Corrections.*[148] The court found that *Grantham* confirmed the fact that the legislature had re-enacted the doctrine of sovereign immunity during the recent legislative session, and consequentially, waiver was to claims arising after July 1, 1988, as to the state and on or after October 1, 1988, as to political subdivisions.[149] Therefore summary judgment was proper against Mississippi Highway Commission and Department.[150] The court concluded in stating that all routes of action were foreclosed to the Webbs due to the present state of sovereign immunity in Mississippi, and therefore, the court affirmed the dismissal of the action.[151]

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tain highways were designated as "state" highways, the State Highway Commission and the Highway Department were not responsible for their construction and maintenance. *Id.* at 1359. Furthermore, the court determined that the Lincoln County Supervisors had full jurisdiction over roads, ferries, and bridges. *Id.* (citing Miss. Code Ann. § 19-3-41 (1972)).

[145] *Id.* at 1357.

[146] *Id.* The circuit court held that this dispute was governed by Brazeale v. Lewis and United States Fidelity & Guaranty Company, 498 So. 2d 321 (Miss. 1986), and therefore sustained the defendant's Rule 12(b)(6) motion. *Webb*, 536 So. 2d at 1357.

[147] *Webb*, 536 So. 2d at 1358.

[148] 522 So. 2d 219 (Miss. 1988). When the judicially created sovereign immunity was abolished, the court found that the legislature then enacted a legislative sovereign immunity. *Webb*, 536 So. 2d at 1358.

[149] *Webb*, 536 So. 2d at 1359. *See* Miss. Code Ann. § 11-46-6 (Supp. 1987) (providing that waiver was to apply only to claims which arose after July 1, 1988, as to the state, and on or after October 1, 1988, as to political subdivisions).

[150] *Webb*, 536 So. 2d at 1360. The court affirmed the judgment of the circuit court. *Id.*

[151] *Id.* The complaint dated january 30, 1987, was dismissed due to the bar of legislative sovereign immunity, not judicial sovereign immunity. *Id.*

VIII. MISCELLANEOUS

The Mississippi Supreme Court was presented with many diverse issues in the area of tort law during 1988 which, though noteworthy, were not selected for textual commentary. The diverse areas addressed by the court included jury instructions,[152] damages,[153] respondeat supe-

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[152] Turner v. Turner, 524 So. 2d 942, 947 (Miss. 1988). In *Turner*, the Mississippi Supreme Court found that where the standard was that of reasonable car, jury instructions that imposed an absolute duty on the defendant constituted reversible error. *Id.* at 944. The first instruction complained of in *Turner* stated that Turner was required ". . . to decrease her speed as may be necessary to avoid colliding with any person, vehicle, or other conveyance on the highway." *Id.* The second instruction complained of contained the language, ". . . but that at all times and under all circumstances she was required to be diligent and to anticipate the presence of vehicles,. . .". *Id.* The court held that these two instructions when read together placed a higher standard of care on the defendant than that of reasonable care. *Id.* at 947.

In Graves v. Graves, 531 So. 2d 817, 822 (Miss. 1988), the court determined what evidence was sufficient to support a jury instruction for present and future medical expenses. The court held that the plaintiff was incompetent to testify as to the treating physician's prognosis and projected course of treatment as a basis proof of future medical expenses. *Id.* at 822. The court additionally found that the plaintiff's own testimony of increased eye discomfort during the exercise of manual labor was not proof of lost of earning capacity. *Id.*

In reversing due to an error of the circuit court in granting a contributory negligence instruction, the court in Anderson v. Hensley-Smidt, 530 So. 2d 181, 185 (Miss. 1988). found that the negligence of a supervisor was not to be imputed to a manual laborer under his control absent evidence that the laborer was on notice of the supervisor's incompetence or that the laborer had failed to take into account some safety precaution. *Id.*

Similarly, the court in M & M Pipe and Pressure Vessel Fabricators, Inc. v. Roberts, 531 So. 2d 615, 622 (Miss. 1988). reversed and remanded on the issue of damages only. The court found that in determining wrongful death damages, evidence of lack of child support was highly relevant evidence which was proper for the jury's consideration, and that any problem concerning its relevance to the particular issue was to be handled through appropriately drafted instructions. *Id.*

[153] Rotwein v. Holman, 529 So. 2d 173, 177 (Miss. 1988). In affirming the judgment of the circuit court, the *Rotwein* court found that a jury verdict was not to be overturned when there was substantial evidence to support its verdict and when the issue of damages was thoroughly presented to the jury in the court's instructions. *Id.* The lower court in *Rotwein* had granted a peremptory instruction on liability against Holman and in favor of the appellant *Rotwein. Id.* Thus, the jury was instructed to determine the amount of damages only, and the jury denied recovery to Rotwein, a sixty-five-year-old woman, for personal injuries allegedly sustained in a automobile accident. *Id.*

Then, in McGowan v. Est. of Ruby Wright, 524 So. 2d 308, 311 (Miss. 1988), the Mississippi Supreme Court addressed the appropriate measure of damages for the wrongful death of a sixty-seven-year-old male. The jury returned a verdict in *McGowan* for the plaintiffs in the amount of the actual damages, but awarded no punitive damages. *Id.* at 310-11. The Mississippi Supreme Court found that an award of punitive damages rior liability,[154] premises liability,[155] duty owed to a business invitee,[156]

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was within the discretion of the jury, and additionally that punitive damages were only allowed to be awarded by the jury where gross negligence or willful misconduct had been proven. *Id.* at 311. Furthermore, the court explained that MISS. CODE ANN. § 11-7-13 (Supp. 1984) provided that in wrongful death actions, damages were to be recovered in the amount as the jury determined to be just when taking into account all damages of every kind to the decedent and to all the parties interested in the suit. *McGowan*, 524 So. 2d at 308. The court found that this statutory language had been construed to include (1) the present cash value of the life expectancy of the deceased, (2) the loss of the companionship and society of the decedent, (3) the pain and suffering of the decedent between the time of the injury and death, and (4) punitive damages. *Id.* However, the court upheld the jury verdict which reflected that the only damages sustained were the funeral expenses and ambulance fees and that no damages for loss of society and companionship were sustained by the widow. *Id.*

Similarly, in addressing the appropriate measure of damages for loss of consortium, the court in Choctaw, Inc. v. Wichner, 521 So. 2d 878, 882 (Miss. 1988), held that a loss of consortium award was to be reduced according to the amount of negligence imputed upon the injured spouse. The Mississippi Supreme Court granted certification in *Choctaw* on the noninjured spouse's award for loss of consortium was to be reduced as the injured spouse's damages were for contributory negligence. *Id.* The court found that the right to damages for loss of consortium was deemed to be derivative, and therefore, the noninjured spouse was to have no better standing in court than the contributorily negligent spouse. *Id.*

The court reversed and remanded in the case of Gibbs v. Banks, 527 So. 2d 658, 660 (Miss. 1988), because an additur was awarded which was based in an implicit finding of an inadequate award. In *Gibbs*, the trial judge denied the plaintiff's motion for a new trial provided that the defendant accepted a $12,700 additur in favor of the plaintiff. *Id.* The court determined that the trial judge was allowed to usurp the jury's function in awarding an additur only when the jury's verdict was so shocking to the conscience that it evidence bias, passion and prejudice, or that the verdict was contrary to the overwhelming weight of the credible evidence. *Id.* Absent either of these findings, the court explained that the trial court had abused its discretion conditioned upon the non-acceptance of an additur or remittitur. *Id.*; *see* MISS. CODE ANN. (Supp. 1987) (statutory authority for imposing condition of additur or remittitur).

[154] Fruchter v. Lynch Oil Co., 522 So. 2d 195, 201 (Miss. 1988). In *Fruchter*, the Mississippi Supreme Court held that no principal/agent relationship existed where an owner of a gas station had no actual or substantial control over the employees of the operator who had leased the station from the owner in a month-to-month tenancy. *Id.* The dispute in *Fruchter* arose out of an injury which occurred at a Shell service station which was operated by Robert E. Keel and owned by Lynch Oil Company. *Id.* On appeal, the court affirmed the dismissal of Lynch Oil from the suit. *Id.*

[155] Jerry Lee's Grocery, Inc. v. Thompson, 528 So. 2d 293, 296 (Miss. 1988). In reversing, the Mississippi Supreme Court found in *Jerry Lee's Grocery, Inc.*, that the owner or operator of business premises owned a duty to an invitee to exercise reasonable care to keep the premises in a reasonably safe condition and, if the operator was aware of a dangerous condition not readily apparent to the invitee, then he was under a duty to warn the invitee of such condition. *Id.* at 296. The court further stated that when a dangerous condition on the premises was caused by the operator's own negligence, no knowledge of its existence needed to be shown. *Id.* at 295. However, the court recognized

duty owed to a licensee,[157] and product liability.[158]

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that Mississippi case law established that the owner or occupant was not an insurer against all injuries. *Id.* The court thus found that when a dangerous condition on the premises or floor was caused by at third party unconnected with the store operation, then the burden was upon the plaintiff to show that the operator had actual or constructive knowledge of its presence. *Id.* at 296.

In *Jerry Lee's Grocery, Inc.*, the court found that there was no evidence of negligence on behalf of Jerry Lee's Grocery, Inc., with respect to a "Pine Power" puddle on the floor, and the court was therefore required to reverse and to enter judgment for Jerry Lee's Grocery, Inc. *Id.*

[156] Grisham v. John Q. Long, V. F. W. Post No. 4057, Inc., 519 So. 2d 413, 417 (Miss. 1988). The court in *Grisham* considered for the first time the duty of one selling alcohol on the premises to protect its patrons from assaults by other patrons. *Id.* The court determined that the VFW, though not an insurer of its patron's safety, had a duty to exercise reasonable care to protect from reasonable foreseeable injury. *Id.* at 416. Nonetheless, the court found that the lack of adequate lighting outside the V.F.W. door had not been shown to be the proximate cause of an attack which did in fact occur outside the V.F.W. door. *Id.* at 417. The court therefore found that summary judgment in favor of V.F.W. was appropriate since proximate cause was an essential element of the plaintiff's claim. *Id.*; *see* Celotex Corp. v. Catrett, ___ U.S. ___, 106 S. Ct. 2548, 2252-53 (1986) (finding that party who opposes summary judgment on claim or defense has burden as to elements that such opposing party would bear the burden of proof at trial, and when the moving party can show a complete failure of proof on an essential element of the claim or defense, then all other issues become immaterial, and the moving party is entitled to judgment as a matter of law); Fruchter v. Lynch Oil Company, 522 So. 2d 195, n.1 (Miss. 1988) (explaining that Federal Rule 56 was identical to Mississippi Rule 56 and discussing recent cases recognizing that quantum of proof required of burdened party at trial informs content of whether showing of genuine issue of material fact has been made so as to avoid summary judgment). Galloway et al. v. The Travelers Ins. Co. et al., 515 So. 2d 678, 683 (Miss. 1987) (following construction placed upon language of Rule 56, Fed. R. Civ. P., in *Celotex*);

[157] Lucas v. Buddy Jones Ford Lincoln Mercury, Inc., 518 So. 2d 646, 649 (Miss. 1988). In *Lucas*, the court determined that a business owner only had the duty not to willfully or wantonly harm a person who entered the business premises for such person's own personal benefit. *Id.* The dispute in *Lucas* arose when Joyce Lucas slipped and fell on ice that had accumulated at Buddy Jones Ford Dealership when she was picking her some up from her husband, an employee at the dealership. *Id.* at 647. In finding that Joyce Lucas constituted a licensee, the court rejected the contention that Lucas had an implied invitation to visit the dealership which was allegedly derived from encouragement for relatives of employees to pick up payment checks. *Id.* at 648-49. The court explained that there was no business purpose of Lucas's visit and further that the dealership derived no benefit from her visit. *Id.* Thus, the court determined that where the undisputed facts disclosed that a plaintiff was a mere licensee, then the court was not to allow the jury to consider the question of whether or not his status was otherwise. *Id.* at 649. Summary judgment was therefore properly granted. *Id.*

[158] Holifield v. Getty Oil Co., 533 So. 2d 1112, 1118 (Miss. 1988). The Mississippi Supreme Court held in *Holifield* that an oil well did not constitute a product for purposes of strict liability in tort and further, that the doctrine of strict liability in tort was not applicable to the construction of an oil well by an oil company for its own use. *Id.* at

Virginia Leigh Carter
Mary Boyles Morrison

1118 In explaining its reasoning, the court stated that an isolated sale of an oil well use did not constitute "engaging in the business of selling of oil wells" for purposes of strict liability. *Id.* at 1115-116 The court concluded that summary judgment had been properly granted even though discovery had not been completed. *Id.* at 1118.

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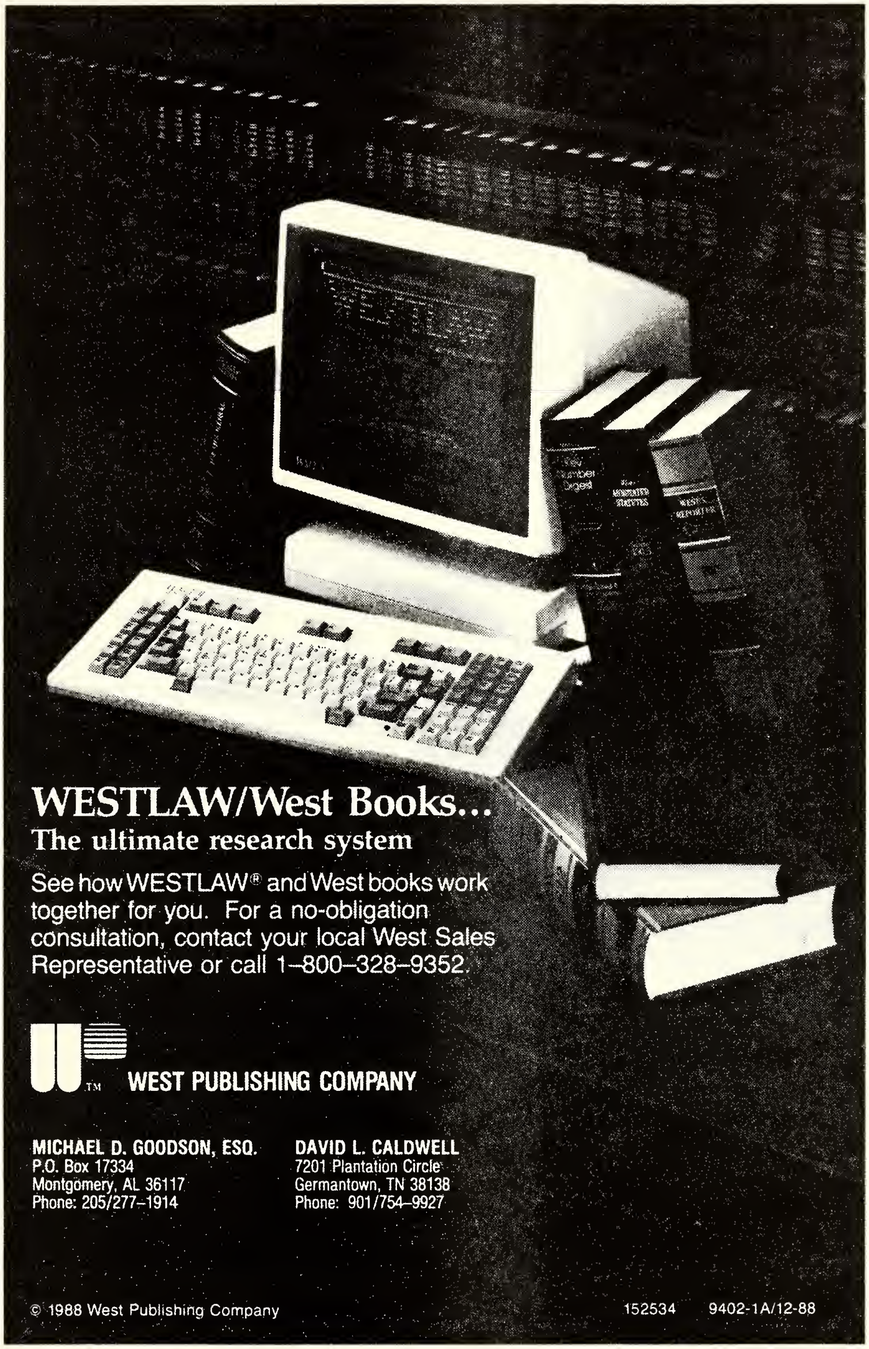

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